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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF**  
**MONTANA TERRITORY**

**FROM THE AUGUST TERM, 1877, TO JANUARY TERM, 1880, INCLUSIVE.**

**BY**  
**HENRY N. BLAKE**  
**AND**  
**CORNELIUS HEDGES.**

**VOLUME III.**

**SAN FRANCISCO, CAL.:**  
**BANCROFT-WHITNEY COMPANY, PUBLISHERS.**

1911

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# JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

---

## CHIEF JUSTICE :

HON. DECIUS S. WADE - - - - - MARCH 17, 1871.

## APPOINTED :

## ASSOCIATE JUSTICES :

HON. HIRAM KNOWLES - - - - - JULY 18, 1868.  
HON. HENRY N. BLAKE - - - - - AUGUST 10, 1875.  
HON. WILLIAM J. GALBRAITH, *vice* KNOWLES - JULY 1, 1879.  
HON. EVERTON J. CONGER, *vice* BLAKE - - MARCH 2, 1880.

## APPOINTED :

## CLERK :

ISAAC R. ALDEN.

## REPORTER :

CORNELIUS HEDGES.

## UNITED STATES MARSHALS :

WILLIAM F. WHEELER,  
ALEXANDER C. BOTKIN.

## UNITED STATES ATTORNEYS :

\*MERRITT C. PAGE,  
ROBERT S. ANDERSON,  
†JOHN W. ANDREWS, JR.,  
DRYDEN, JAMES L.

---

\* Died May 13, 1877.

† Died May 8, 1880.



# RULES OF THE SUPREME COURT,

ADOPTED SINCE THE JANUARY TERM, 1877.

---

*August Term, 1878.*

Unless made a part of the record in the court below by a bill of exceptions, or unless upon an inspection of the judgment-roll, some question of error arises upon the formal parts of pleadings, motions and other papers in the court below, hereafter designated, such formal parts of pleadings and papers shall be omitted in making records to be sent to this court, viz. :

1. The title of the cause of all papers filed subsequent to the complaint or indictment, and such omission shall be indicated by the words, "Title of cause."

2. In depositions, all except the questions and answers of witnesses with their signature; and as to these, they shall be omitted when the respective attorneys can agree upon the substance of the evidence in a form more brief, in which event such substance of the evidence shall be inserted in lieu of the questions and answers, and so indicated by the clerk.

3. In deeds, mortgages, contracts and other exhibits, which are made a part of the record by pleadings, bills of exception or statements on motions for new trials or on appeal, the indorsements thereof, and also the certificate of acknowledgment thereof, and the same may be indicated by the word "Acknowledged," or the word "Recorded," as may be proper and according to the fact.

4. All indorsements made by officers on papers in the subordinate courts and tribunals, except the returns of sheriffs, deputy sheriffs, marshals and deputy marshals, or persons appointed to perform their services, or the services of some of them.

Whenever, in the judgment of this court, any of the writings herein ordered to be omitted, shall be deemed useful, it may order them to be certified to this court.

Hereafter the clerk will not insert upon the docket or trial calendar of this court the name of any attorney or counselor at law as representing any party in this court except upon an appearance entered by such an attorney and counselor for that purpose; but this rule shall not apply to the district attorneys of the several districts of the Territory, nor to the attorney of the United States in cases with which they are officially identified. Upon filing any transcript on appeal, the attorney or attorneys representing the party filing the same shall enter his or their appearance for such party, and the attorney or attorneys representing the opposite party shall enter their appearance for such party before the case is set down for hearing; and until the entry of the appearance of counsel upon the opposite side, where service upon the party is impracticable, service on the clerk of this court of all briefs or motions looking to a correction or perfection of the record shall be a sufficient service.

*August Term, 1880.*

Rules 18 and 22 are hereby amended to read as follows, viz.:

The appellant shall file with the transcript a brief of his points and authorities.

The respondent shall file with the clerk a copy of his points and authorities at least one day before the cause is assigned for hearing.

The appellant and respondent shall furnish to each other a copy of their briefs at least one day before the time set for the hearing of the cause, and to each of the justices; or either party may file one copy with the clerk, who shall cause the requisite copies to be made. And in case either party shall fail to furnish such copy to the opposite party as required by this rule, he shall be deemed to waive his rights to argue such cause orally, except by consent.

No brief, not filed in accordance with this rule, will be considered by the court, except after at least one day's notice of the

**filing** of the same to the opposite party, who shall have such time as may be allowed by the court, after the filing thereof to file his reply thereto.

References in the brief to matters in the transcript shall be referred to by page and line, and shown by marginal notes on the brief.

**RULE 22.** When the court takes a case under advisement, it shall file its opinion at or before the next term thereafter.

These rules as amended shall be and take the place of the rules heretofore so numbed.

## ATTORNEYS AND COUNSELORS AT LAW,

LICENSED AND ADMITTED SINCE THE JANUARY TERM, 1877.

---

ANDREWS, JOHN W., JR.

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THOMPSON, EDWIN S.

WALKER, CHARLES.

WARNER, J. F.

WHEELER, WILLIAM F.

## PREFACE.

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Mr. Justice BLAKE prepared for publication in this volume the cases in which the opinion of the court was delivered by him, and three cases that were decided at the August Term, 1880, and Mr. HEDGES prepared the other cases.

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**CASES**  
**ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT,**

**AT THE**  
**AUGUST TERM, 1877.**

---

**Present:**

**Hon. DECIUS S. WADE, CHIEF JUSTICE.**  
**Hon. HIRAM KNOWLES, } JUSTICES.**  
**Hon. HENRY N. BLAKE, }**

---

**HIRBOUR, appellant, v. REEDING, respondent.**

**VERBAL CONTRACT — copartnership for locating quartz lode — Statute of Frauds.** A., B. and C. entered into a verbal contract of copartnership to prospect for, locate, record, pre-empt, develop and mine quartz lodes in this Territory. Each party was to have the same interest in the property. The Silver Girdle lode was discovered by the parties, but it was recorded by B. and C. in their names, April 28, 1873. Afterward, in July, 1875, all the parties worked upon and developed the property. After the lode had been recorded D. located and pre-empted a part of the Silver Girdle lode under the name of the Burlington lode, but the conflict of title was settled by a conveyance by D. to B. and C. of 1,350 feet of the Burlington lode, which had been included in the Silver Girdle lode. B. and C. refused to give A. any interest in the lode, or account for the proceeds thereof. *Held*, that the contract between A., B. and C. was not within the Statute of Frauds, and could be enforced. *Held*, also, that the conveyance from D. to B. and C. did not impair the rights of A.

*Appeal from Second District, Deer Lodge County.*

KNOWLES, J., sustained the demurrer to the complaint. Hirbour declined to amend the same and judgment was entered for Reeding and Gassert, the defendants.

SHARP & NAPTON, for appellant.

The Statute of Frauds has no application to a contract of the character of the one in suit, and if it did, the part performance to the extent of the performance carries it out. *Gore v. McBrayer*, 18 Cal. 582; *Skillman v. Lachman*, 23 id. 198; *Duryea v. Burt*, 28 id. 577, *Settembre v. Putnam*, 30 id. 490; *Boucher v. Mulverhill*, 1 Mon. 306; Story on Part. 127-129; Sts. U. S. on Mineral Lands; Browne on Frauds, §§ 234-236.

This was a mining adventure, which was unknown to the law at the time of the enactment of the Statute of Charles II, 29; Yale on Min. Claims, 233; *Bradbury v. Barnes*, 19 Cal. 620. The Statute of Frauds is to prevent frauds and is never extended in its application to a new matter, so as to work a fraud, which would be the result in this case. 1 Story's Eq. Jur. (8th ed.), §§ 330, 331. It never applies to a mercantile transaction. In the case of an indorser, part performance takes it out of the statute. 2 Story's Eq. Jur. (8th ed.), § 1522; 3 Pars. on Cont. (6th ed.), 59-60.

The question fairly presented in this case is, whether a prospector, under a verbal contract of copartnership, when a discovery is made, shall make a race for the recorder's office to prevent other partners from acquiring title to the entire property.

W. W. DIXON, for respondent.

A contract for a partnership in real estate is within the Statute of Frauds and void unless in writing. Cod. Sts. 393, § 6; Story on Part., § 83; Pars. on Part. 368; 3 Pars. on Cont. (5th ed.) 155; *Pitts v. Waugh*, 4 Mass. 424; *Gray v. Palmer*, 9 Cal. 616; *Thorn v. Thorn*, 11 Iowa, 146; *Wilson v. Ray*, 13 Ind. 1; *Levy v. Brush*, 45 N. Y. 589; *Bird v. Morrison*, 9 Wis. 551.

The California cases cited by appellant do not decide the point in issue. It was there held under the old statute that mining

claims, placer and quartz, could be vested or conveyed without writing. In Montana, quartz claims are real estate.

The complaint does not show any such part performance of the alleged partnership contract as will take the case out of the Statute of Frauds, or authorize the court to decree a specific performance. There is no allegation of how much work appellant did on the lode, or its value, or that it was all he was required to do by the partnership contract. The allegations of the complaint may be true, and appellant may not have worked one hour on the lode. Appellant does not show that he performed, or offered to perform, his part of the contract. These are among the grounds of demurrer. These facts appellant must allege and prove to take the case out of the statute. 2 Estee's Pl. 483, §§ 27, 28; *Denniston v. Coquillard*, 5 McLean, 253; *Colson v. Thompson*, 2 Wheat. 336; *Edwards v. Estell*, 48 Cal. 194; *Joseph v. Holt*, 37 id. 250; *Mather v. Scoles*, 35 Ind. 1; *Chase v. Hogan*, 6 Bosw. 431.

If the demurrer was well taken upon any ground, the judgment should be affirmed. 3 Estee's Pl. 744.

The real question in this case is, whether a verbal contract of copartnership in real estate, with no sufficient acts or performance alleged to take the case out of the plain provisions of the Statute of Frauds, will be enforced by the court.

BLAKE, J. The action of the court below in sustaining the demurrer of the respondents to the complaint of the appellant is before us for review. The following facts appear in the complaint and must be taken as true upon this hearing. Hirbour, the appellant, and Reeding and Gassert, the respondents, entered into a verbal contract of copartnership in April, 1873, at Rocker City in this Territory, "for the purpose of prospecting for, locating, recording, pre-empting, developing and mining quartz lodes and other mining property in Montana Territory." Each party was to have an undivided third interest in said lodes and property, and pay for one-third of the labor and other expenses incurred in carrying on the business of the copartnership. Under this contract, the Silver Girdle lode was discovered by the

parties, but it was recorded in the names of the respondents by them April 23, 1873, when it should have been recorded in the names of the copartners. All the parties "worked upon and mined" this lode in July, 1875, and developed and "displayed great value" in the property. "Said work and labor were done and performed" by the parties "as copartners in obedience to, and under and by virtue of, said contract of copartnership." After the lode had been recorded, certain persons, Young and Rouderbush, located and pre-empted under the name of the Burlington lode a part of the Silver Girdle lode. The conflict respecting the titles to the property was compromised, and Young and Rouderbush conveyed by a deed to the respondents July 29, 1875, thirteen hundred and fifty feet of the Burlington lode, which was included within the boundaries of the Silver Girdle lode. The respondents refuse to give the appellant an interest in the property, and have extracted therefrom a large quantity of valuable ore. The copartnership has not been dissolved, and there has been no accounting between the parties.

The respondents demurred to the complaint upon the following grounds:

That the contract of copartnership was within the Statute of Frauds of this Territory and void; and that the complaint was ambiguous in failing to state the amount of the work which was done by the appellant upon the lode, or its value, or the time when it was done. The court below sustained the demurrer, and judgment was afterward entered for the respondents.

The respondents claim that the allegation of the complaint respecting the amount of the work performed by the appellant on the property is ambiguous, but we think that it should be deemed an averment that the appellant performed his part of the conditions of the contract of copartnership. When this allegation is controverted by the respondents, the appellant must establish on the trial "the facts showing such performance." Civ. Pr. Act, § 68. Therefore the examination of one question will enable us to determine this appeal. If the contract of copartnership is valid we are of the opinion that the complaint contains the allegations that are necessary to empower the court to enter a decree

requiring the respondents to convey to the appellant his interest in the property in controversy. Is this contract within the Statute of Frauds of this Territory? The following sections of the act relating to conveyances and contracts are pertinent to this inquiry:

“No estate or interest in lands other than for leases for a term not exceeding one year, or any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.” Cod. Sts. 393, § 6. “The term ‘lands,’ as used in this act, shall be construed as co-extensive in meaning with land, tenements, hereditaments and possessory land claims to public lands; and the terms ‘estate’ and ‘interest’ in lands shall be construed to embrace every estate and interest, present and future, vested and contingent, in lands as above defined.” Cod. Sts. 394, § 22; 389, § 1.

It does not appear that the respondents have acquired the title of the United States to the property. Their interest in the lode may be lost or forfeited by abandonment, or a failure to comply with the laws of the mining district, the Territory or the United States. Counsel for both parties concede, what we consider a sound proposition, that the lode in dispute is real estate. *Melton v. Lambard*, 51 Cal. 258. We must apply to the contract set forth in the complaint the legal principles that govern copartnerships for the purchase and improvement of real property.

A partnership may be formed without any written articles between the parties. “After some question it seems to be settled that there may be a partnership for the buying and selling of land.” Pars. on Part. 37, n. *f*. According to the weight of the authorities which are conflicting upon the question, the contract of such a partnership need not be reduced to writing to make it valid. Pars. on Part. 7, n. *d*. We do not intend to review the cases in which this subject has been examined, but will refer to a number of the most recent decisions which we have read.

The supreme court of Indiana holds in *Holmes v. McCray*, 51 Ind. 358, that a parol agreement for a partnership for the purpose of dealing in lands is not within the Statute of Frauds. Chief Justice BIDDLE, in the opinion, says: "As between the partnership and its vendors or vendees in the sale or purchase of lands, the statute in all cases would operate; but as between the partners themselves, when they are neither vendors nor vendees of one another, we cannot see how the statute can affect their agreements."

In New York, the same views are announced in *Chester v. Dickerson*, 54 N. Y. 1, and *Fairchild v. Fairchild*, 64 id. 471. Chief Justice WADE in his concurring opinion quotes from the opinion of the court in *Chester v. Dickerson*, *supra*, and this reference is therefore sufficient.<sup>1</sup> The same matter is considered in *Traphagen v. Burt*, 67 N. Y. 30, and the court comments on the case of *Levy v. Brush*, 45 id. 589, which is relied on by the respondents, and says: "In the case cited (*Levy v. Brush*, *supra*), the plaintiff had done no act of performance, advanced no money, nor parted with anything under the contract, nor had the land been accepted, possessed and treated as joint property, nor improvements made upon the same accordingly, and the contract regarded as carried into effect. \* \* \* Where a party has partly performed or parted with valuable property upon the faith of the contract, equity will not allow another party to retain property obtained upon the faith of a verbal contract to consummate a fraud by retaining the property and refusing to perform the contract."

These rules have been applied to the settlement of questions arising concerning quartz lodes. The case of *Murley v. Ennis*, 2 Col. 300, is directly in point. Mr. Justice WELLS says in the opinion: "If two or more go into the public domain together to search and explore for mines, with the agreement to occupy and develop such discoveries as may be made for the joint benefit, and such discovery, development and joint occupation follow, it is clear that, while each explorer becomes invested with his due

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<sup>1</sup> *Post*, 25.

share and estate in the premises, no provision of the Statute of Frauds is violated. \* \* \* Such contract of association is merely the creation of an agency in each of those contracting, and is no more a violation of law than a contract of partnership or association in any lawful calling."

In *Welland v. Huber*, 8 Nev. 203, three persons and Huber, in December, 1871, entered into a verbal agreement to prospect for and locate mines. All the parties were to be equal owners. In 1872, Huber located the Huber lode, 1,000 feet in length, and recorded in the name of each partner 200 feet and in his own name 400 feet. In the decision Mr. Justice BELKNAP says: "If Huber located the 400 feet in his own name in pursuance of the alleged partnership, he did so under an implied promise to convey to the complainants their interest in it upon request. The complainants at once acquired a right to a specific performance, and that right could be enforced in equity without a previous request."

In *Gore v. McBrayer*, 18 Cal. 582, Gore, McBrayer and others verbally agreed to prospect for quartz. The court held that the Statute of Frauds which requires an instrument in writing to create an interest in land, does not apply to the taking up of mining claims, and that a writing is not necessary to vest or divest title on locating mines. In *Settembre v. Putnam*, 30 Cal. 490, it is decided that, if mining partners, under a verbal agreement, claim and develop a lode upon the land of another, and authorize one of their number to buy the same for the benefit of all, and he procures a deed in his own name, he holds the legal title of the interests of his partners in trust for them.

After examining these cases we conclude that the contract of copartnership made by the appellant and respondents is valid and can be enforced. The name of the property in controversy, which may be called the Silver Girdle lode, or the Burlington lode, is immaterial. It was acquired and developed by the labor of the appellant and respondents under the contract, and is the property of the parties to this action. The transaction between the respondents and Young and Rouderbush, by which the same estate under another name was conveyed to the respondents, does not affect the rights of the appellant to his interest. The legal

title is vested in the respondents, but equity will treat them as trustees for all the partners. *Fairchild v. Fairchild*, *supra*; Pars. on Part. 363; Story on Part., § 92; Bainbridge on Mines (3d ed.), 395; *Dupuy v. Leavenworth*, 17 Cal. 262; *Miller v. Ball*, 64 N. Y. 286.

The demurrer to the complaint should have been overruled.

WADE, C. J., concurring. The question presented by this record is, whether or not, if two or more persons enter into a verbal agreement of copartnership in the business of prospecting for and discovering quartz claims, and when discovered, to acquire title thereto for the mutual benefit of the copartners, such contract, not being in writing, is within the Statute of Frauds and void.

Congress has granted to the citizens of the United States, and to those who have declared their intention to become such, the privilege of entering upon and exploring the public domain for the purpose of discovering valuable mineral deposits therein. The business therefore of searching or prospecting for quartz lodes or placers is entirely legitimate, largely engaged in in this Territory, and may be conducted either individually or in partnership. All kinds of property may be held in partnership. Quartz claims by our statute are made real estate, and there can be no question that it is entirely legitimate for parties to enter into a partnership for the purpose of trading, dealing and speculating in real estate. *Clagett v. Kilbourne*, 1 Black, 346; *Fall River W. Co. v. Borden*, 10 Cush. 458; Pars. on Part. 37; 3 Kent, 24, 28. The inquiry before us, however, has to do with the proposition as to how the existence of such a partnership shall be evidenced and established. Our statute has been cited by Mr. Justice BLAKE, *ante*, 19.

Did this verbal agreement of copartnership create, grant or declare any interest in real estate at the time it was entered into? Evidently not, for at that time, as to this copartnership there was no real estate in existence; neither of the partners then owned or had any interest in a quartz claim; such claim was yet to be searched for and found. There was nothing upon which

the agreement could operate. It created and declared the title to nothing at all. A quartz claim is not real estate until discovered and located, and a verbal agreement concerning an undiscovered and unknown claim is not and cannot be an agreement creating or disposing of an interest in real estate, and if not, such agreement is not within the statute.

This agreement contemplated that the parties would search for and find quartz claims, and when found, that they would comply with the provisions of the act of congress, whereby title could be acquired. But the agreement in and of itself did not create or declare a title to any property whatever. If by this agreement the parties had attempted to make a parol or verbal conveyance of land, or any interest therein, they would have utterly failed, for at the time the agreement was made they had no lands to convey. Evidently then it was not the object or purpose of this agreement to create, grant or declare any interest in real estate. How are the titles to quartz claims acquired, created or declared? First, a valuable mineral deposit must be found; second, it must be distinctly marked and located; third, \$500 worth of work must have been performed upon the claim before a patent can be granted; fourth, after finding the lead, locating it, and performing the necessary amount of labor, an application may be filed in the local land office for a patent, and after publication of notice for sixty days, as the law requires, and no adverse claim being interposed, a patent may issue. But at the time of this agreement none of these things had been accomplished, no lead had been found, and it seems, therefore, reasonable to follow that the agreement did not attempt to create, grant, assign or declare any interest in real estate and is not within the Statute of Frauds.

We think the following authorities conclusively determine the proposition that a partnership may exist in reference to acquiring title to the sale and ownership of real estate, and that such partnership may be created by parol agreement.

In *Dale v. Hamilton*, 5 Hare, 369, the bill of the plaintiff alleged the parol agreement of copartnership with the defendants for the purpose of speculating in lands. The vice-chancellor in

deciding the case said: "When the proposition was first advanced by the plaintiff, I confess, it appeared to me, that to admit the argument to the extent contended for, would be virtually to repeal the Statute of Frauds, or nearly so." But upon a further examination of the authorities he held that the plaintiff might first prove, by parol, the existence of the partnership as an independent fact, and that being established, he might then show, by the same evidence, his interest in the lands, considered as the substratum or stock of the partnership. Pars. on Part. 7, n. d.

In *Smith v. Tarlton*, 2 Barb. Ch. 336, the bill stated that by the copartnership agreement, which was by parol, the complainant and the defendants entered into a partnership which was to continue three years, the business of which was to purchase a water privilege and site for a foundry in the village of Plattsburgh and to erect an iron foundry, or furnace thereon, and to carry on the business of manufacturing iron castings, etc., and that each of the copartners was to contribute a certain amount of funds to the capital of the firm; that the parties all contributed money to the capital, and a site was procured and a foundry erected thereon by the copartners, but that the title to the land was taken in the name of the defendants only. The chancellor in the course of his decision said: "I cannot see that there is any validity in either of the objections raised by the counsel of the defendants to the parol agreement of copartnership. This was not, as the counsel supposes, an agreement which was not to be performed within one year, so as to require it to be in writing under the Statute of Frauds; but it was the formation of an immediate partnership between the parties, which partnership was to continue three years unless sooner dissolved by the consent of such parties. In this State no written articles are necessary to constitute a copartnership which is to take effect immediately, although a written agreement might be necessary to bind the parties to enter into a future copartnership to commence after the expiration of a year. But even where there was a parol agreement to enter into a copartnership at a future day and specifying the terms of such copartnership, I apprehend that, if the parties went into copartnership at the prescribed time with-

out agreeing upon any new terms, the former parol agreement would be presumed to constitute the terms on which such partnership was entered into and carried on."

"Nor is the objection well taken that this partnership was invalid because a part of the business of the firm was to purchase real estate as a site for the foundry, and to erect a building thereon for the purpose of making iron castings, etc. The case of *Henderson v. Hudson*, 1 Mumf. 510, referred to by the defendants' counsel, was not a case of partnership, or of land purchased with partnership funds for the use of the copartnership firm. It was merely an attempt to create a trust by parol in lands purchased by an individual in his own name and with his own funds. But real estate purchased with partnership funds for the use of the firm, although the legal title is in the member or members of the firm in whose name the conveyance is taken, is in equity considered as the property of the firm for the payment of its debts and for the purpose of adjusting the equitable claims of the copartners as between themselves." The motion to dissolve the injunction for the reason that the bill did not state a cause of action was therefore denied.

In the case of *Chester v. Dickerson*, 54 N. Y. 1, the question was again decided. Counsel in their briefs in that case made the point that the lower court erred in holding that the partnership of the defendants in the lands in question could exist by parol, and cited authorities to support the proposition, to which the adverse counsel replied, citing authorities, and the court was called upon directly to decide the question, and by EARL, J., the court say "it cannot be questioned that two or more persons may become partners in buying and selling land. There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. Story on Part., §§ 82, 83; Collyer on Part., §§ 3, 51; *Dudley v. Littlefield*, 21 Me. 418; *Sage v. Sherman*, 2 N. Y. 417; *Mead v. Shepard*, 54 Barb. 474; *Pendleton v. Wambersie*, 4 Cranch, 73; *Thompson v. Bowman*, 6 Wall. 316; *Hoxie v. Carr*, 1 Sumner, 173. KENT says: 'A partnership is a contract of two or more persons to place their

money, effects, labor and skill or some one or all of them in lawful commerce or business, and to divide the profit and share the loss in certain proportions, and that it is not essential to a legal partnership that it be confined to commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stage coaches, artisans or farmers, as well as between merchants and bankers' (3 Kent's Com. 24, 28), and why may it not exist between dealers and speculators in real estate."

"But as it is claimed that the partnership in this case existed by parol before the execution of the written agreement, dated November 28, 1864, it is necessary to inquire whether a partnership in reference to lands can be formed and proved by parol. Upon this question there is considerable conflict in the authorities. On the one hand it is claimed that a parol agreement for such a partnership would be within the Statute of Frauds which provides that no estate or interest in lands shall be created, assigned or declared unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning or declaring the same; (the New York statute being in this regard the same as our own) and to this effect is the case of *Smith v. Burnham*, 3 Sumner, 345. On the other hand it is claimed that such an agreement is not affected by the Statute of Frauds, for that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of and administer upon all the partnership property whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the Statute of Frauds, and to this effect are the following authorities: *Dale v. Hamilton*, 5 Hare, 369; *Essex v. Essex*, 20 Beav. 449; *Bunnell v. Taintor*, 4 Conn. 568. A full discussion of the question is found in *Dale v. Hamilton*, and the reasoning and review of the cases there by Vice-Chancellor WAGRAM are quite satisfactory. The general doctrine is there laid down "that a partnership agreement between A. and B. that they

shall be jointly interested in a speculation for buying, improving for sale and selling lands may be proved without being evidenced by any writing signed by, or by the authority of the party to be charged therewith within the Statute of Frauds, and such an agreement being proved, A. or B. may establish his interest in the land, the subject of the partnership, without such interest, being evidenced by any such writing.' I am inclined to think this doctrine to be founded upon the best reason and the best authority. But whether it is or not is not very important to decide in this case. Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the Statute of Frauds? No estate or interest in land has been granted, assigned or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. (As in the case at bar when the agreement was made no quartz claims had been discovered, none were owned by the firm, and neither party attempted to assign or convey to the other.) The contract is a valid one, and in pursuance of this agreement they go on and buy, improve and sell lands (as in the case we are considering, in pursuance of the agreement the parties go on and discover, and locate quartz claims). While they are doing this do they not act as partners and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands; it is simply aimed at the creation or conveyance of an estate in lands without writing. If there was a parol agreement in this case before the written one, it was just like the one embodied in the writing, to wit, a partnership to purchase, lease and take the refusals of land and then sell, lease or work them for the joint benefit of the parties. This is not a controversy about the title to any of the lands taken or owned by the partners but it simply relates to the conduct of the defendants while they

were acting as partners, and in such a case the Statute of Frauds certainly can present no obstacle to relief." The court then go on to find as a matter of fact from the evidence, that there was a partnership existing between the parties; that such partnership was evidenced by a parol agreement; that the same was a valid partnership, although formed for the purpose of buying, selling and speculating in lands, and adjust the rights of the parties accordingly.

The case of *Traphagen v. Burt*, 67 N. Y. 30, is to the same effect. In that case the plaintiff and defendant made an oral agreement to engage in the business of buying and selling farms for their mutual benefit and at their joint risk. Under this agreement defendant bought two farms and took the deeds to himself and plaintiff jointly. He afterward purchased the farm in question but took the deed to himself alone, refusing to admit the plaintiff to any participation in the ownership, the facts being very similar to the case in hand, except in the case we are considering the plaintiff discovered the quartz lead and the defendants obtained the title thereto, and refused to admit the plaintiff to any participation in the ownership thereof. In deciding the case, which was an action brought to establish a trust in the defendant, Burt, in favor of the plaintiff, for one undivided half of the farm in question, the court say: "It is established by abundant authority in this State that a partnership may exist in reference to the purchase, sale and ownership of lands, and that it may be created by a parol agreement."

Upon these authorities and the reasons therefor, I rest the opinion that the complaint in this action contained a cause of action, and that the demurrer thereto should have been overruled.

KNOWLES, J., dissenting. I cannot assent to the opinion expressed by the majority of the court in this case and will present my views as briefly as I can for dissenting therefrom.

I do not deny but that a verbal partnership agreement may be formed for trading in real estate; but I contend that when one partner comes into a court and asks that real estate held exclu-

sively by one member of the firm in his name shall be decreed partnership property, and an interest therein decreed to the applicant, such partnership must then be evidenced by some note or memoranda in writing, or it will be held to be within the provisions of the Statute of Frauds, unless it clearly appears that this real estate was acquired with partnership capital for partnership purposes, in such a way as to make the partner in whose name the property is held a trustee for the partnership. It is said that a verbal partnership agreement to deal in lands creates no interests in lands if it has for its object the acquiring in the future such property. But when lands are acquired under such a partnership, and one of the partners takes a deed to the same in his own name, what does create an interest in this land in favor of the other partner but the verbal partnership agreement, if he has any interest at all in it? If a party to such an agreement comes into court and asks that he may be decreed an interest in this land, as in this case, as the basis of his action he must set up a verbal partnership agreement. I cannot see how there is any escape from the conclusion that under such circumstances an interest in land will be created by virtue of a verbal agreement. I cannot see why a partnership agreement should be treated as different from any other agreement. It is urged, however, that lands held by a partnership have none of the characteristics of real estate, but are treated as personal property in a court of equity, and from this it follows that a verbal partnership agreement is never called upon to create an interest in land, but in personal property only. To what extent is land held by a partnership treated in equity as personal property? I apprehend this to be the rule: When real estate is purchased with partnership capital and held for partnership uses, it is treated as personal estate in equity for these purposes and these only—the settlement of accounts between the partners, and the payment of partnership debts. When these are accomplished, it assumes the character of real estate and is subject to all its incidents. *Pars. on Part.* 382–385; *Dyer v. Clark*, 5 Met. 562. This question is elaborately discussed in a note to § 93, *Story on Part.*, and I think the above conclusion reached. *Sigourney v. Munn*, 7 Conn. 11.

Take the most liberal opinions upon this subject, save *Holmes v. McCray*, 51 Ind. 358, and I am sure it will be found that they all hold that the real estate must be purchased with partnership funds and devoted to partnership uses, before it can be treated as partnership property and classed as personal estate.

I will now recur to the allegations of the complaint. It is alleged that the plaintiff and the defendants Reeding and Gassert entered into a verbal contract of copartnership for the purpose of prospecting, developing and mining quartz lodes and other mining property. That each was to have an undivided one-third interest in all mines discovered, pre-empted, located, recorded or mined, and were to share equally and alike in the labor and expenses in carrying out said purpose. That the partnership was to remain in force until dissolved by mutual consent. There is no allegation to the effect that they actually commenced operations under this contract. It is not shown that this mine was discovered by their joint labor, or located by their joint labor, or recorded at their joint expense. It is not shown that plaintiff has fully performed his part of this agreement. It is true that it is alleged that the said parties, plaintiff and defendants Gassert and Reeding, as such copartners, discovered what is now and was then known as the Silver Girdle lode. This is one of those allegations that may be and probably is a conclusion of law. It may be claimed that the plaintiff and defendants being partners, the act of one is the act of all.

Put the most favorable construction upon this allegation, and still it leaves out certain acts necessary for the acquiring of title from the government of the United States. For instance, there is no allegation that the plaintiff and defendants located this mine or recorded it, but that they discovered it. If A. and B. should discover a quartz mine, and A. should say to B., I want none of this lode, or should do nothing toward locating it, and B. should go on and locate it and record it, would it be possible that A. could come in and say, because we discovered this mine together, therefore I am entitled to one-half of it? The reason that equity treats real estate purchased with partnership funds for partnership purposes, partnership property, is because a trust arises in equity in this

property in favor of the firm. It is upon the principle, that, if A. furnishes B. money with which to purchase land for him, or on their joint account, and B. takes this money and invests it in land and takes the deed in his own name, a trust arises concerning this land in A.'s favor, and B. will be compelled to recognize it in a court of equity, although there was no memoranda or note in writing by which the above agreement could be proved. I think I am fully justified in saying, that, under the allegations in this complaint, it does not conclusively appear that there is any trust in this quartz claim in favor of plaintiff for the reason that it does not appear that the title to the mine was acquired from the general government with partnership funds, that is, joint labor and expense. And I hold that there is a further defect in this complaint if, as I claim, the true rule is that real estate purchased with partnership funds for partnership purposes is to be treated as personal property only for the purpose of settling accounts between partners, and the payment of partnership debts. There is no allegation that the partnership is indebted to plaintiff in any amount for any cause. There is no allegation that the partnership is indebted to other persons in any sums whatever for which plaintiff is liable. There is an allegation that defendants are taking out large quantities of quartz and disposing of the same, but whether to a profit or not is not set forth. There is one other allegation I must notice in the complaint. It is alleged that plaintiff, through his agent, has worked and assisted in developing this mine, but this allegation cannot be construed as an allegation of funds used in acquiring the mine. In my judgment we are presented with the question whether a mere verbal agreement for a copartnership will entitle a person to an interest in lands, although it was not acquired with partnership funds, and there is nothing to show that the partnership is indebted to him or to other persons for which debts plaintiff is liable. To hold that, by virtue of such a partnership agreement, a man may acquire an interest in land would be setting aside completely the Statute of Frauds and Perjuries in regard to creating an interest in land. The weight of authority, it appears to me, is decidedly against allowing such a contract to create an

interest in land. Such was undoubtedly the ruling in the case of *Smith v. Burnham*, 3 Sumn. (C. C.) 435, and *Thorn v. Thorn*, 11 Iowa, 146. The cases of *Hale v. Henrie*, 2 Watts, 143, and *Pitts v. Waugh*, 4 Mass. 424, go further than I contend the rule is. The case of *Gray v. Palmer*, 9 Cal. 616, was a much stronger case for the applicant than the case presented here, but the court held that an interest in land could not be created by a verbal contract of copartnership to deal in real estate. Pars. on Part. 381, in discussing this question says: "In like manner the peremptory provisions of the Statute of Frauds would apply; and even equity would feel itself obliged to pay some regard to them. Hence, if a partnership were formed even to trade in lands, and for nothing else, the lands when bought must not only have an owner by legal title, and pass solely from him and solely by a legal title, *but all contracts and agreements between the partners themselves*, as well as between them and strangers, for the sale 'of lands, tenements and hereditaments, or any interest in or concerning them' should be written and signed. But in this there are conflicting views which we shall consider in the next section."

In the next section, he shows what these conflicting views are. They are the conflicting views between what may be termed the American rule and the English. The English rule treats partnership real property as personal property for all purposes. The American rule treats the real property of a partnership as personal property for the purposes of settling partnership accounts between partners, and the payment of partnership debts and no further. Pars. on Part. 382-385. Hence, according to the English rule, the partnership being once established, then all property acquired by the firm is treated in equity for all purposes as personal property and hence the Statute of Frauds does not apply. But under the American rule, it is only personal property for the purposes of settling partnership accounts and the payment of partnership debts. Hence, in order to treat real estate as partnership personal property, there must be accounts to settle between the partners or partnership debts, which I have shown does not appear in this case, and hence this real estate cannot be treated as personal property. I will now review for a short space the cases relied upon by the majority of the court.

*Dale v. Hamilton*, 5 Hare's Ch. 368, is an English case, and perhaps the principal one that is relied upon as establishing the English rule. But, when fully considered, it will be found that it is a very different case from this and presenting much stronger equities, and further, that the court did not decide that a partnership had been formed, but referred the question to a jury; and ordered that certain written evidence should be introduced in this trial before the jury, in regard to this partnership, that showed conclusively that there was a partnership to deal in lands and in the very lands in dispute. The case of *Fall River W. Co. v. Borden*, 10 Cush. 474, shows that a partnership to deal in real estate, evidenced by the written evidence that appeared in the case of *Dale v. Hamilton*, was not within the Statute of Frauds. I think further that the cases cited in support of *Dale v. Hamilton* do not fully maintain the views of the court in that case. The case of *Chester v. Dickerson*, 54 N. Y. 1, certainly cannot be considered a case in point. There no interest in land was sought to be created by virtue of any partnership agreement. That was for an action for deceit against certain partners who had sold some oil lands. I do not suppose any one holds now that a simple (verbal contract of) partnership to deal in lands is within the Statute of Frauds.

It is only when an interest is sought to be created in land that such an agreement is within the Statute of Frauds. In this case, the court admits that all it said upon the subject of verbal partnerships was dicta and not necessary to the decision. The case of *Bunnell v. Taintor*, 4 Conn. 568, is not in point. That was a case of a partnership in the profits arising from buying and selling certain lands. The land was not to be considered as partnership property, but as the property of one member of the firm, and the partnership was to be confined to the profits of the sale. This certainly was not a parallel case. The case of *Smith v. Tarlton*, 2 Barb. Ch. 336, was a case where real estate was purchased by a partnership with partnership funds, for partnership purposes, and used as such, and was but an incident to a manufacturing enterprise. The courts have generally held that such real estate was partnership property, no matter in whose name held. If in the

name of one partner, he is a trustee of the firm. In this case, the object of the bill was to obtain a settlement of partnership accounts and concerns, and to restrain one of the defendants from misapplying partnership funds. The last sentence in that decision is as follows: "But real estate purchased with partnership funds for the use of the firm, although the legal title is in the member or members of the firm in whose name the conveyance is taken, is in equity considered as the property of the firm, *for the payment of its debts, and for the purpose of adjusting the equitable claims of the copartners as between themselves.*"

Judge STORY, in the case of *Smith v. Burnham*, 3 Sumn. C. C. 435, expressly declares such a case without the Statute of Frauds. The case of *Murley v. Ennis*, 2 Col. 300, is relied upon. That was not a case where a title was sought to be created in land by virtue of a verbal contract of partnership to prospect for mines, and locate the same. The court holds that such a contract is not within the Statute of Frauds. This I do not controvert; but when the court comes to discuss the right of Ennis to an interest in the mine discovered by Murley, it uses this language: "Nor does the interest or estate which is afterward acquired vest or inure by virtue of the agreement, but by the occupation and appropriation alone." The point the court makes in that case is, that Murley acted as the agent of Ennis in discovering and appropriating the mine for which he was a competent agent. The case, it will also be observed, was not one where an interest in land was sought to be created by virtue of a partnership agreement, but an action to recover a debt; and it does seem that the right of Ennis to recover might have been placed upon different grounds from what the court did.

The only case I think that can be found which fully supports the views of the majority of the court is that of *Holmes v. McCray*, 51 Ind. 358, and that I have shown is decided upon the authority of a dicta, in the case of *Chester v. Dickerson*, 54 N. Y. 1, and which was not a case in point; the case of *Holmes v. McCray* and this stand, in my judgment, by themselves, and are not supported by authority or sound reasoning.

*Judgment reversed.*

## THE HOPE MINING CO., appellant, v. KENNON, TREAS., respondent.

CONSTRUCTION OF STATUTE — *Revenue Act — silver bullion.* In construing the several sections of the Revenue Act (Codified Statutes, 1872), the aim must be to ascertain the intention of the legislature as far as possible by the act itself, as a whole, and with all its parts. Sedgwick on Stat. and Const. Law, 379. Section 4 of this act cannot be construed alone to the disregard of other sections containing general provisions equally explicit. Nor can the enumeration therein of certain kinds of property liable to taxation be properly construed as exempting other species of property not enumerated. Taxation is the rule, and exemption the exception.

The exemption of unpatented mines does not extend to the product of such mines, nor is it liable to the charge of double taxation, because the stock of an incorporated company is taxable, and also the products of a mine worked by such company.

Silver bullion is property within the meaning of the law, and not being contained within any express exemption, must be regarded as taxable under the law.

*Appeal from Second District, Deer Lodge County.*

THIS cause was tried in both courts upon an agreed statement of facts, involving only a construction of the statute.

SHARP & NAPTON, for appellant.

The exemption of the mine exempts the product of the same. Courts should acquiesce in the construction that heretofore has uniformly been given this act. See Sedgwick on Stat. and Const. Law, 379; *Pennington v. Cox*, 2 Cranch, 33; *United States v. Fisher*, id. 358; *Preston v. Browder*, 1 Wheat. 115.

A thing must be within the intent as well as letter of the law. Cooley on Tax. 202.

The statute will not be construed to create excessive taxation. Cooley on Const. Lim. (3d ed.) 519–20, and cases cited.

Taxation of the stock of an incorporated company by implication exempts its property, else results double taxation. Angell & Ames on Corp. 373; 10 Mass. 514; 17 id. 53, 461; *State v. Brown*, 23 N. J. 484; *State v. Bentley*, id. 532; *Baltimore v. B. & O. R. R. Co.*, 6 Gill, 288; 13 Wall. 264; Cooley on Taxation, 160–166.

Double taxation is void regardless of constitutional limitations. Cooley on Const. Law, title Taxation.

By the enumeration of certain kinds of property in section 4 of the Revenue Act, all other property not designated is exempt from taxation.

When general words follow particular ones the former are to be construed as applicable to the persons or things particularly mentioned. *City of St. Louis v. Loughlin*, 49 Mo. 563; Sedgwick on Stat. and Const. Law, 423.

If bullion had been intended to be made subject to taxation it would have been specified along with gold dust and money in coin.

A. E. MAYHEW and W. W. DIXON, for respondent.

As to the power to tax the product of unpatented mines the title of which is in the United States, see *State v. Moore*, 12 Cal. 56; *People v. Shearer*, 30 id. 645; *People v. Cohen*, 31 id. 210; 37 id. 54.

There are but two restrictions in the Organic Act on the power of the legislature of the Territory to impose taxation, neither of which affect the subject-matter in controversy.

Courts are to confine themselves to the constitutionality and meaning of law and not to regard its policy, morality or hardship. Sedgwick on Stat. and Const. Law, 180, 185, 229, 231; *S. & V. R. R. Co. v. Stockton*, 41 Cal. 147; *Sands v. Maclay*, 2 Mont. 35.

Bullion is property and is nowhere exempted from taxation. See §§ 3 and 4, Codified Statutes, 1872.

General words in a statute must receive a general construction unless some ground can be found in the statute restricting or enlarging the meaning of the general words. *Tynan v. Walker*, 35 Cal. 634.

Section 6 shows that the law contemplated the taxation of other property not mentioned in section 4.

Exemptions from taxation are to be strictly construed. See Cooley on Tax. 130, 146, 153, 154, and note 2; Sedgwick on Stat. and Const. Law, 344.

Even unjust and duplicate taxation is not invalid. Cooley, 160-3.

WADE, C. J. The question involved in this appeal is whether or not, under the laws of this Territory, that particular property known as base or crude silver bullion is subject to taxation. Bullion is defined to be uncoined gold or silver in mass. Properly, the precious metals are called bullion when smelted and not perfectly refined, or when refined, but in bars or ingots, or in any form uncoined, as in plate. Crude or base silver bullion, as familiarly known in this Territory, and which is mentioned in the agreed statement of facts herein, is silver in bars, mixed to a greater or less extent with base metals. Silver bullion as thus described and known here is property. The agreed statement shows that the appellants are in possession of, and own property of this kind, of the value of \$88,112. In this Territory bullion is an article of commerce, and its production is one of the leading branches of industry here.

Is this kind of property subject to or exempt from taxation?

Every form of government necessarily provides some system of taxation. This results from the objects and purposes for which governments are instituted and organized, viz.: the guarantee and protection of individual rights, and the security and enjoyment of private property. And as all property is alike protected, it follows that the burden imposed as the price of this security should be equally and evenly distributed. Hence results the proposition, that taxation is the rule, and exemption from taxation, the exception. Taxation, however, is controlled by legislative enactments, and its scope and extent is as limited by law. Our legislature has devised a system of revenue laws, and taxation being entirely a creature of statute, to these laws we must look to determine the question involved herein.

Section 3 of our act for the collection of revenue provides (Codified Statutes, 1872, 601): "All property of every kind and nature in this Territory, on the first day of January of each year, or which shall arrive or be found in this Territory before the last day of December, ensuing, shall be subject to taxation except,"

etc. \* \* \* Then follow nine certain specific exceptions, such as court-houses, jails, school-houses, public asylums, churches, other charitable institutions and the like, which are designed to exempt certain property from taxation. This section is explicit and certain. It requires no interpretation; its language is unambiguous and positive, and embraces property of every kind and character not therein specially excepted.

Section 4 provides: "All other property, real or personal, within this Territory is subject to taxation in the manner herein directed, and this is intended to embrace improvements on land," etc., naming several other kinds of property.

Section 15 provides that the tax list shall contain his, her, or their lands, personal property employed in merchandise, etc., and the amount of all other taxable property not enumerated.

Section 16 defines specifically what the tax list shall contain, and requires the person who is being assessed for taxation to answer under oath at the conclusion of the list, the following questions: "Have you any other property than that above mentioned?" "If so, enumerate it."

In construing these sections and others of the Revenue Act, our purpose must be to ascertain the intention of the legislature. The means of ascertaining this intention are to be found in the statute itself, taken as a whole, with all its parts. Sedgwick on Stat. and Const. Law, 379.

It is a universal principle of construction that courts must find the intent of the legislature in the statute itself. Unless some ground can be found in the statute restraining or enlarging the meaning of its general words, they must receive a general construction, and the courts cannot arbitrarily subtract from or add thereto. *Tynan v. Walker*, 35 Cal. 642.

It is assumed by the appellant in the argument that section 3 of the act expresses the general intention of the legislature, and that section 4 limits and controls such intention by specifying particulars. In other words, that section 4, in the specific items of property therein named and described, contains all the kinds of property that under any circumstances are subject to taxation. This assumption is not warranted by the rules of stat-

utory construction. We must gather the general intention of the legislature from an inspection of the whole enactment and every part of it. We cannot look exclusively at section 4, and shut our eyes to the other sections. Each section, if possible, should be made to harmonize with every other section, and only when the words are ambiguous and uncertain can resort be had to any thing outside the statute itself. If the language is unambiguous it is its own interpreter.

It is further assumed that section 4, when it declares that "All other property, real and personal, within the Territory is subject to taxation in the manner herein directed, and that this is intended to embrace improvements on land," etc., naming several different kinds of property, thereby defines in the enumeration of particular property just what is meant by the general words, "all other property, real and personal," — that is to say, that section 4 names certain property as subject to taxation, defining what is embraced in the words, "all other property, real and personal," and that all property within the Territory not so named is exempt from taxation.

There might be some force in this assumption, if section 4 contained the whole enactments. But this section must be construed with reference to each and every other section of the act, and effect must, if possible, be given to each section. The evident intention of the legislature in making an enumeration in section 4 was to subject to taxation certain property, that otherwise might have escaped the burden, such as annuities, franchises, ditches, flumes, money, gold dust, etc.

If section 4 in its enumeration of property embraces all property upon which a tax can be levied, then we are forced to the conclusion that the legislature, in the passage of section 4, thereby intended to make void sections 3, 15 and 16, for these sections imperatively require that all property of every name and nature shall be listed and valued for taxation whether such property is enumerated in the statute or not.

Now an examination of the whole act and its several sections at once produces the conviction that the legislature intended that all property of every kind in the Territory should be subject to

taxation, saving only such property as is therein specially exempted. Section 3 demands this by declaring that all property of every kind and nature shall be subject to taxation. Section 15, by requiring a list of all property whether enumerated or not; and section 16, by requiring the person to answer not only as to the property named, but as to all other property he may have. The bare fact that certain property is, by the language of the act, exempted from taxation raises a strong presumption that all other property is subjected to taxation, and when that natural presumption is made absolute by the words of the statute, there is left no room to doubt what the legislature intended.

Sections 3, 15 and 16 are in perfect harmony. Section 3 provides that all property of every kind shall be subject to taxation; section 15 requires the assessor to list all property for taxation whether enumerated or not; and section 16 requires the person who is being assessed to answer, under oath, not only as to the property mentioned in the statute, but as to any and every other kind or species of property he may own. Section 4 is not in conflict with either of these sections. While there are mentioned in section 4 several kinds of property, about which there could be no doubt as to its being subject to taxation, the evident object and purpose of the enumeration contained in this section was to cover property, which but for such enumeration might have escaped taxation, as for instance, improvements on land made under a mere possessory right, while yet the title remained in the United States, or gold coin, gold dust, bank bills, annuities, etc. But whether the property is enumerated or not; whether it is or is not named in section 4, the absolute requirement of sections 3, 15 and 16 is that it shall be named and valued in the list for taxation. The language of these three sections is much broader and at the same time more particular and specific than is the language of section 4, and with better propriety might it be said that these sections make void section 4, than to say with the appellants that section 4 virtually makes them void. The requirement that certain property shall be taxed is not at all in conflict with the requirement that all other property shall be taxed. The enumeration in section 4 does not in the least

conflict with the requirements of sections 15 and 16, that the tax list shall contain, not only the property enumerated, but any and all other property.

A bare inspection of section 4 will refute the proposition contended for by the appellants, that taxation is wholly confined to the very limited and restricted kinds of property therein enumerated. Our Revenue Act is a general one evidently designed to subject the property of the Territory generally to taxation. We cannot hold, unless compelled to do so by the rules of interpretation, that the legislature intended to particularize and name only the different kinds of property that should be taxed. The nature, form and shape of property is constantly changing; new industries are constantly producing new kinds of property; every year by importation, by ingenuity, industry and enterprise, something new, something unknown to the particular nomenclature of the statute is added to the property of the Territory, and the language of the statute in its broad and general terms, as well as common sense, forbids an interpretation that limits and restricts taxation to the very few articles originally designated in the act.

The interpretation contended for exempts all merchandise in the Territory from taxation. The property known as merchandise is unknown to section 4; section 6 provides how merchandise *in the possession of merchants* shall be listed and valued, but for the requirement that it shall be taxed, when thus listed and valued, we must look to the general words of sections 3, 15 and 16. Section 4 is silent on the subject, but the law-makers having provided for the listing and valuation of merchandise for taxation, we must conclude that they supposed they had provided for such taxation in the sections named. The valuation of merchandise is an idle thing unless it can be taxed, and the provision for its valuation is entirely harmless for all there is in section 4.

Owning property for the purposes of taxation, and the authorizing of a levy thereon, are entirely different things, and by adopting the interpretation asked for, we have a statute providing for the mode and manner of listing and valuing of merchandise for taxation, but no authority to levy a tax thereon. And

even this listing and valuing is only required when the merchandise is in the possession of merchants. Now, suppose this kind of property is in the possession of persons other than merchants. According to the argument, such property so owned and possessed is absolutely exempt from taxation. It is not even to be listed or valued. If section 4 controls, then this and a vast amount of other property in the Territory escapes taxation.

Take the article of wool, property largely produced in the Territory. It is not named in section 4, and it is not merchandise. It is produced by the stock-men and farmers and used or sold where best they can find a market. It is nowhere named in the statute, and therefore according to the notion of appellants is exempt from taxation. And so, beef in the barrel, hams, bacon and mutton, representing a large industry here, and with which our meat markets are filled, are not named in the statute and therefore are exempt. The article of wood, the production of which engages the attention of a large class of people here, is not mentioned in the statute. And so with lumber, the production of which builds up fortunes; and so with flour, wheat, pork, oats, barley, hay, malt, potatoes, all farm products after being severed from the land; manufactured sash, doors, blinds, steam-engines, boilers and castings. All of these things are produced here and represent a large amount of property, but not being named in section 4 are exempt from taxation according to the theory of appellants. Take the property known as hides and furs, both being produced here in large quantities, representing the wealth and labor of numerous individuals, and yet not being named in section 4, are to escape all taxation. And so with property in copper, lead and coal, each the product of the Territory and representing property here. And so we might continue to an almost unlimited extent, to name property in the Territory that is unknown to section 4, and which therefore, according to the proposition of appellants, should escape taxation.

In the light of these facts can we suppose that the legislature, after having declared that all property in the Territory should be subject to taxation, intended, by the enactment of section 4, to make taxation the exception, and exemption the rule? The theory

of the appellants would compel the adoption of this rule, for it is safe to say that more property in the Territory can be named outside of section 4 than is mentioned in that section.

But it is argued that had it been the intention of the legislature to subject bullion to taxation, it would not have been left out of the enumeration of property in section 4, subject to taxation, when money in coin and gold dust are spoken of and embraced in the enumeration. We have already indicated the reason why gold dust and coin were mentioned in the enumeration. But suppose this gold dust is melted and run into bars, as it generally is, as soon as taken from the ground, whereby it becomes bullion, then, according to the position of the appellants, it is to escape taxation; and so, if coin is converted into bullion, it cannot be taxed, because bullion is not named in section 4. And so, if A. is the owner of a valuable herd of cattle and sells them and converts their value into bullion, wool, wood, lumber or merchandise, he thereby places his property beyond the reach of assessment for taxation. In like manner if any of the property mentioned in section 4 is but converted into property not therein named, and especially into bullion, it becomes at once exempt from taxes. Even if the change of form increases the value of the property, but changes its name, then it is to escape.

These illustrations, it seems to me, demonstrate the fallacy of the appellants' position. The truth is that when our Revenue Act became a law, the country had not produced property known as silver bullion to any extent. Gold, from placers and leads, was then our chief production in the precious metals, which the legislature was careful to subject to taxation. Since that day an extensive industry has sprung up here in the production of silver bullion, copper and lead, and care seems to have been taken in the enactment of our Revenue Laws, to make them broad enough to cover every kind and description of property that might be brought into, or produced within, the Territory.

It is claimed that one of the exemptions in section 3 forbids the taxation of bullion. The exemption is as follows:

"Ninth — mines and mining claims, except those held under patent from the United States."

A mining claim is a certain defined piece or parcel of ground, and the meaning of this exemption is that while the claimant has merely a possessory title, and before acquiring title from the United States this ground shall not be subject to taxation. That is to say, the mere possessory right of the claimant in the ground itself shall not be taxed. But this exemption does not cover the product of the mine any more than the exemption of growing crops exempts the money for which they are sold.

The legislature could not have intended to subject to taxation the products of patented mines, while those of unpatented mines were exempt, where every thing necessary to procure the issuance of a patent had been performed by the claimant.

Suppose a homestead of 160 acres was exempt from taxation, would it necessarily follow that its products, its horses, cows, sheep, wool, grain and hay were also exempt?

The plaintiff is a corporation whose stock is divided into shares and owned by individuals, and the appellant contends that because these shares of stock are subject to taxation, therefore the products of the property are exempt. Suppose this corporation owned a farm and was engaged in the business of raising sheep for the production of wool and mutton, instead of owning a mine and engaged in the business of producing bullion. In the former case the shares of stock would represent the value of the farm as a farm, while in the latter they would represent the value of the mine as a mine, independent of what labor and skill might make it produce. Even if the taxation of the products of the mine and the shares of stock works a hardship or results in duplicate taxation, the same is not invalid. The law must be enforced until it is repealed.

For these reasons the judgment is affirmed, with costs.

*Judgment affirmed.*

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BLACK, respondent, v. CLENDENIN, appellant.

*JURISDICTION—service of summons in Territorial cases—subpœna in chancery.* This action was brought in the district court to obtain the dissolution of a copartnership, and the parties were residents of the Territory. A

complaint was filed and the clerk issued a legal summons and a subpœna in chancery, which were served by the United States marshal for Montana Territory. *Held*, that the marshal was not the proper officer to serve the summons. *Held*, also, that the subpœna in chancery was not a summons within the terms of the Civil Practice Act. *Held*, further, that the district court did not acquire jurisdiction of the defendant by these proceedings.

SAME — *objections not waived by answer and trial*. The defendant appeared specially and moved to set aside the proceedings under the summons and subpœna, and excepted to the action of the court in overruling his motion; afterward he filed an answer and proceeded to a trial upon the merits. *Held*, that the defendant did not waive his objections to the jurisdiction of the court.

*Appeal from Third District, Lewis and Clarke Counties.*

THIS action was tried by WADE, C. J.

SANDERS & CULLEN, and SHOBER & LOWRY, for appellant.

The subpœna was of no validity, and the certificate of the U. S. marshal had no legal efficacy. *United States v. Ensign*, 2 Mon. 396. The United States marshal is unknown to our Civil Practice Act, and the service of the summons is confided to certain officers and persons. The sheriff can only serve papers in his county and no certificate is of legal force except it be provided by law. *Woods v. Nabors*, 1 Stew. (Ala.) 172; *Hallowell Bank v. Hamlin*, 14 Mass. 178; *Oakes v. Hill*, 14 Pick. 442; *Langford v. Sanger*, 35 Mo. 133; *Allen v. Dunham*, 1 Greene (Iowa), 89.

After the appellant excepted to the ruling of the court in refusing to set aside the service of these papers, there was an answer and appearance on compulsion, as effectually as if the papers had been nullities. Such enforced appearance is no waiver of the error which compels it to avoid a default.

CHUMASERO & CHADWICK, for respondent.

It is not claimed by appellant that the summons was not served by any one, but that the person who served it signed the return as United States marshal. In the motion to set aside the proceedings, appellant admits the receipt of the process, and thereby a complete service is shown under the statute. The summons was not a nullity but was perfect. This suit was pending several

years before it was tried and was continued from term to term at the instance of both parties. The answer of appellant was a full and unqualified appearance of appellant, and his objection to the jurisdiction of the court was waived thereby.

BLAKE, J. This action was commenced March 30, 1872, to procure the dissolution of a copartnership and an accounting between the appellant and respondent. The complaint was filed in the office of the clerk of the third judicial district, in and for Lewis and Clarke counties. A summons in conformity to the statutes of the Territory was issued April 1, 1872, and the return thereon is as follows:

“OFFICE OF THE MARSHAL, U. S. DIST. OF MONTANA:

I hereby certify that I received the within summons on the 12th day of April, A. D. 1872, and personally served the same on the defendant 29th day of April, A. D. 1872, on George Clendenin, Jr., being the defendant named in said summons, by delivering to him, said defendant, personally, in the county of Dawson, a copy of said summons and a certified copy of the complaint in the action named in said summons, attached to said copy of summons.

MUSCLESHELL, dated this 29th day of April, A. D. 1872.

W. F. WHEELER, *Marshal*,

By CHAS. D. HARD, *Deputy Marshal*.”

A subpoena in chancery was also issued April 1, 1872, and served by the same officer, April 29, 1872, in Dawson county. Clendenin filed a motion June 3, 1872, to set aside the proceedings under the summons and subpoena. The attorneys appeared for the purpose of making this motion “and none other,” and stated specifically the grounds thereof. The motion was overruled by the court, June 5, 1872, and Clendenin excepted. The answer of the appellant was filed June 8, 1872, and other proceedings were had in the action, but a judgment in favor of Black was not entered until June 26, 1877. It will not be necessary to consider any other rulings than those which have been referred to, and the arguments of counsel upon most of the questions arising in this case cannot be examined.

When the summons and subpoena were served on the appellant, Dawson county was attached to Meagher county for judicial purposes, and Meagher county belonged to the third judicial district of the Territory. The Civil Practice Act, approved December 23, 1867, is applicable to these proceedings and provides that "the summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought, or by any white male citizen of the United States, over 21 years of age, who is competent to be a witness on the trial of the action. \* \* \* Sts. 1867, 139, § 28. This section provides further, that, "when the summons is served by the sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer of its service. \* \* \* When the summons is served by any other person as before provided, it shall be returned to the office of the clerk from which it issued with the affidavit of such person of its service." \* \* \*

Statutes containing similar clauses have been enacted in many States and received a uniform construction. The mode, which has been prescribed by them for acquiring jurisdiction, must be followed substantially, or the judgment will be a nullity. The return upon the summons must show that it was served by the officer who is authorized by law to perform this act. In the case at bar it appears that the proper process was not executed by the sheriff of any county in the Territory, or a deputy sheriff, or any person mentioned in the Civil Practice Act. If the summons had been served by any party appointed or empowered to act in this matter, the affidavit thereon must show that he was one of the persons described in the statutes. The certificate or affidavit of service must state the facts on which the right to execute process depends. *McMillan v. Reynolds*, 11 Cal. 372, and cases there cited; *People v. Bernal*, 43 id. 385. It does not appear that the person who served the summons on the appellant was clothed with any power in the premises. Wheeler and Hard were officers of the United States, and, by virtue of their authority, served the foregoing processes. In *Clinton v. Englebrecht*, 13 Wall. 434, it was held that the United States marshal for Utah

Territory was not entitled to serve the processes which issue from the local courts, and that the officers created by the legislative assembly of the Territory had the sole right to execute the same. This authority is decisive of this branch of the case.

The subpoena was as follows :

"In First Judicial District Court, in and for Lewis and Clarke County, Montana Territory — in Chancery.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To W. F. WHEELER, Esq., *Marshal of the District of Montana Territory* :

We command you to subpoena George Clendenin, Jr., to appear before Hon. D. S. WADE, judge of the third judicial district of said Territory in our court of chancery, on the first Monday of June, 1872, at the court-house in Helena, \* \* \* to answer to a bill of complaint exhibited against him in our said court, by Leander M. Black, and to do further and receive what our said court shall have considered in that behalf, and this you will in no wise omit.

Witness \* \* \*

It may not be improper to observe, that at the time when the subpoena was issued, the practice in cases in equity in this Territory was involved in doubt. The decisions in the courts of the United States and the Territories were conflicting. It is useless to examine the authorities on this question, because we must be governed by the principles announced by the court of last resort in *Hornbuckle v. Toombs*, 18 Wall. 648. This court followed that decision in *United States v. Ensign*, 2 Mon. 396, and held that the legislative assembly of this Territory has the power to enact a Code of Civil Procedure, and prescribe the forms of actions and modes of practice in the Territorial courts. The form of a summons is prescribed by law and must be observed, "at least substantially." *Lyman v. Milton*, 44 Cal. 630. The subpoena did not conform to the provisions of the Civil Practice Act. It was not a summons, and the service thereof did not confer jurisdiction upon the court below.

The respondent insists that the appellant waived these errors and irregularities by filing his answer and proceeding to a trial. This position is not tenable. It has been held in California that a party who moves to dismiss a defective summons, or set aside the return of the service of a summons, and saves his exception to the action of the court in overruling the motion, does not waive his right to be heard thereon upon appeal, by appearing subsequently and answering and submitting to a trial. *Deidesheimer v. Brown*, 8 Cal. 339; *Gray v. Hawes*, id. 562; *Lyman v. Milton*, *supra*; *Kent v. West*, 50 Cal. 186. The exceptions of the appellant were saved properly, and were not waived by his conduct in the action after the motions to set aside the proceedings under the summons and subpoena were refused.\*

The motions of the appellant, which have been discussed, should have been sustained. This action has been commenced legally by the filing of a complaint and the issuance of a summons, but no proper service has been made upon the appellant, and the court below never had jurisdiction of his person.

It is therefore ordered that the judgment of the court below be reversed with costs, and that the cause be remanded with directions to proceed in conformity to this opinion.

*Judgment reversed.*

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\* After this opinion had been filed, the decision of the supreme court of the United States in *Harkness v. Hyde*, 98 U. S. 476, was published, and this proposition is maintained. In this case the sheriff of a county in Idaho Territory served a summons on the defendant within an Indian reservation, and the subsequent proceedings were similar to those in *Black v. Clendenin*, *supra*. Mr Justice FIELD delivered the opinion and said: "The right of the defendant to insist upon the objection to the illegality of the service was not waived by the special appearance of counsel for him" to move to set aside the service. "Nor, when that motion was overruled, by their answering for him to the merits of the action. Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceeding without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

## TERRITORY, respondent, v. CORBETT, appellant.

**CRIMINAL LAW**—*jurisdiction of grand jury.* The district courts have jurisdiction of every crime known to our laws. 2 Mont. 531. The jurisdiction of the grand jury is co-extensive. Crim. Pr. Act, § 143.

**CONSTRUCTION OF STATUTE**—*fornication—variance in language—surplusage.* Section 146 of the Criminal Laws, under which the indictment in this case was drawn, creates no specific crime of fornication nor does it cover the case of living in a state of open fornication, which was constituted a crime by the first legislature of Montana, but it covers any act of sexual intercourse between persons related within certain prohibited degrees.

A public offense need not be charged in the exact words of the statute; the meaning must be preserved. Crim. Pr. Act, § 169.

It is sufficient if the statute offense is covered by a part of the charge—the rest may be rejected as surplusage.

**MARRIAGES**—*prohibited—incestuous.* Marriages between parties prohibited by law from inter-marrying are necessarily incestuous and void. Any act of sexual intercourse between parties so related is within the terms of the law describing it as fornication or adultery.

**WITNESSES**—*accomplice.* An accomplice is a competent witness in this Territory. Codified Statutes, 271, § 14. Neither the consent of the partner in crime nor permission of court is necessary. Neither is it necessary that the charge against the accomplice be first dismissed.

**ARGUMENTS OF COUNSEL.** It is discretionary with the court to hear argument of counsel. If satisfied it is not error to decline to hear it.

**INSTRUCTIONS.** It is not error in a court to refuse instructions that do not state correctly the law of the case, or that have already been covered by instructions given.

**EVIDENCE**—*accomplice—corroboration.* The testimony of an accomplice need not be corroborated on every item. Failure of this is not ground for a new trial.

**CONFIDENTIAL COMMUNICATIONS**—*physicians.* The consent of the patient only is necessary to render competent the testimony of physicians touching matters of information acquired in attending such patient in his professional capacity and which were necessary for them to know to enable them to prescribe or act for the patient. Codified Statutes, 125, § 450. In the present case the communications do not come within the specified exemptions and no consent was necessary.

**WITNESSES**—*names indorsed on indictment.* Our statutes do not require that the names of all the witnesses for the Territory should be indorsed on the indictment. Codified Statutes, 214, § 157.

**MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT.** The motion for a new trial should be made before judgment is entered, but the hearing thereon may occur afterward. That in arrest of judgment must be made and heard before judgment is entered. If made afterward the court may, without error, disregard or overrule it.

*Appeal from First District, Madison County.*

THIS cause was tried in the court below by BLAKE, J.

J. E. CALLAWAY, for appellant.

The demurrer to the indictment was improperly overruled. Neither the court nor grand jury had jurisdiction of the offense charged. The offense charged is nowhere made a crime by our laws. There is no such crime as *fornication* recognized, defined or provided with penalty under the statutes of Montana. The law making it a crime for a man and woman to live together in an open state of fornication, passed by the first legislature of the Territory, was omitted from the Codified Laws of 1872.

No case is to be brought within the statute by construction. Bishop on Stat. Crimes, § 220.

There is no law of the Territory declaring any marriage of parties, however related, incestuous and void.

The court erred in denying a change of venue. The court should exercise a reasonable discretion. *People v. Mahoney*, 18 Cal. 188.

The court erred in admitting testimony of the accomplice, and further in refusing to hear argument of counsel thereon.

The court erred in giving instructions No. 1, 2, 3, and in refusing instruction No. 7.

The motion for a new trial was improperly overruled; the evidence under our laws was not sufficient to justify the verdict.

The failure to prove defendant was unmarried was fatal. *Territory v. Whitcomb*, 1 Mont. 362.

The admission of testimony of Smith and Yager was error. It did not corroborate that of the accomplice. It is ground for new trial where defendant is found guilty on the uncorroborated testimony of an accomplice. *Ray v. The State*, 1 Green (Iowa), 316; *People v. McElvain*, 39 Cal. 654; *People v. Ames*, 39 id. 403; *People v. Joslyn*, id. 392.

It was error to admit testimony of witnesses not indorsed on the indictment. *Smith v. State*, 4 Green (Iowa), 189.

The court erred in rendering judgment while a motion for a new trial was pending. Also for refusing to hear motion in arrest of judgment.

J. G. SPRATT, district attorney, for respondent.

The sufficiency of the indictment in this case is to be tried by the construction of section 146, page 303 of the Codified Statutes of Montana, under which it was drawn, and also of section 2, page 520, of the same statutes, prohibiting marriages between parties nearer of kin than second cousins. Internarriage of such parties is void. Sedgwick on Stat. and Const. Law, 84-89.

Sexual intercourse between parties so related is incestuous. Bouvier's Law Dictionary.

A witness may waive her right to refuse to testify when such testimony would criminate herself. No third person can object. *Southard v. Buford*, 6 Cowen, 254; Starkie on Ev. 41 and note at bottom.

Privileged communications become competent testimony with consent of the patient. Defendant was not the patient and had nothing to say. *Johnson v. Johnson*, 14 Wend. 637; 1st Greenleaf on Ev., § 249.

Consultation with physicians about procuring abortions are not privileged communications under our statute. Codified Statutes, 125, § 450; *Hewett v. Prince*, 21 Wend. 79.

KNOWLES, J. This defendant was indicted by the grand jury of Madison county, for a violation of the provisions of section 146 of the Criminal Laws of this Territory. The section is as follows:

"Persons being within the degrees of consanguinity, within which marriages are declared to be incestuous and void, who shall inter-marry with each other, or who shall commit fornication or adultery with each other, shall, on conviction, be punished by imprisonment in the Territorial prison not less than one, nor exceeding ten years."

I will consider the points presented in this case somewhat in the order in which they are presented in appellant's brief.

It is claimed that the grand jury which found the indictment had no jurisdiction to inquire into the offense charged. According to section 6 of the Criminal Practice Act the district court has jurisdiction of all offenses which subject the offender to imprisonment in the Territorial prison. An offender in such a case as this would be subject to imprisonment in the Territorial prison. It was held by the court in the case of *Territory v. Flowers*, 2 Mont. 531, that the district courts in the respective counties when they convene, had jurisdiction of every crime known to our laws. It is evident, from a consideration of the general scope of the Criminal Practice Act, that a grand jury is one of the means provided the district court for inquiring into public offenses, and that its jurisdiction in that particular is co-extensive with that of the district court in which it is impaneled.

Section 143 of the Criminal Practice Act undoubtedly settles this question. It provides that "the grand jury has power, and it is their duty to inquire into all public offenses committed or triable within the jurisdiction of this court, and to present them to the court by indictment." There is then no validity in this first objection to the indictment.

The second ground of objection to the indictment is that the facts stated do not constitute a public offense. Under this head it is urged that the indictment charges that the defendant committed "the crime of fornication," when there is no such crime known to our laws. It is true that our criminal statutes do not specify any acts that shall constitute the crime of fornication, and there never was any such crime known to our laws. The criminal laws enacted by the first legislative assembly of the Territory provided a punishment for persons living in an open state of fornication.

The indictment under consideration was evidently drawn to meet the provisions of section 146 of our Criminal Laws, and under that section all the other facts appearing, only one single act of fornication would be sufficient to constitute the crime therein specified. Hence, although that law of the first legislative assembly may be in force now, it could not meet a case where there was but a single act of fornication, for living in an open state of

fornication is a different offense from fornication. The fact that the indictment calls fornication a crime would not probably vitiate it. The words "crime of" may perhaps be considered surplusage. Quite a number of cases are cited in Bishop on Crim. Proc., § 481 and note 4, where words in indictments have been regarded as surplusage when it is not so apparent that they are such, as in this indictment. It is not necessary, however, that we should rest our decision upon this point upon the construction of that clause in the indictment.

The indictment, after setting forth all the other necessary facts, contains this language: "Did commit the crime of fornication with the said Sarah Parker, and then and there had carnal and sexual intercourse with the said Sarah Parker."

If the language, "then and there had carnal and sexual intercourse," is equivalent to the term, "fornication," used in the statute, then the indictment is sufficient in its allegations upon this point without the words, "crime of fornication."

Section 169 of our Criminal Practice Act provides: "Words used in the statute to define a public offense need not be strictly pursued, but other words conveying the same meaning may be used."

Webster's Dictionary defines fornication to be "the incontinence or lewdness of an unmarried person, male or female." Bouvier's Law Dictionary defines it as, "The unlawful carnal knowledge of an unmarried person with another, whether the latter be married or unmarried." The first count in the indictment charges that the defendant is unmarried. There cannot be any doubt but the words, "carnal and sexual intercourse," have a meaning equivalent to the words used by the above works in defining fornication.

The clause in the indictment, "did commit the crime of fornication," then may be surely treated as surplusage. "No indictment shall be quashed or set aside for any surplusage when there is sufficient matter alleged to indicate the crime and person charged." Codified Statutes, § 171, p. 217.

The next objection to the indictment is in effect an objection to the statute under which it is drawn. It is insisted that the

laws of this Territory do not declare any marriage incestuous and void, and without some law of this import this statute is a nullity.

We have a statute that reads as follows : " No marriage shall be contracted while either of the parties shall have a husband or wife living, nor between parties who are nearer of kin than second cousins, computing by the rules of the civil law, whether by the half or whole blood." Marriage under our laws is treated as a civil contract. The general rule is that when any contract is entered into which is prohibited by a statute it is void, and it is not necessary that the statute should in express terms declare it void. The prohibition of such a contract in effect declares it void. Sedgwick on Stat. and Const. Law, 84; 2 Pars. on Cont. 746.

The effect of the above statute then is to declare void any marriage between the defendant and Sarah Parker, because it appears that the defendant is her half-brother. It is said, however, that the marriages prohibited between kin in this statute are not declared incestuous. What marriages are incestuous? " When the parties to an act or series of acts of unlawful carnal intercourse are related to each other within the degrees of consanguinity or affinity wherein marriage is prohibited by law, their offense is called incest." Bishop on Stat. Crimes, § 727. To the same effect will be found the definition given in Bouvier's and Burrill's Law Dictionary. The word "incestuous" is an adjective and qualifies a noun, whether it stands for a person or thing, and attaches to it the character of incest. An incestuous person is one guilty of incest. An incestuous cohabitation or sexual intercourse is a cohabitation or sexual intercourse between persons related within the degrees of consanguinity within which marriage is prohibited. So the term "incestuous" is a proper term to apply to a marriage which is contracted between parties related to each other in the degrees within which such contracts are prohibited by law. In 2 Kent's Com., marginal pages 83-4, the phrase "incestuous marriage" is used in treating of marriages contracted by parties related to each other within certain degrees of consanguinity. See, also, *Commonwealth v. Lake*, 113

Mass. 458. When a statute declares such a marriage void or prohibits the same, it is incestuous. To hold otherwise would be as absurd as it would be to hold that because the statute did not in express words declare any acts criminal, that therefore no acts were criminal. There was no error then in overruling the demurrer.

It is urged that the court erred in not awarding the defendant a change of venue. The application for this was supported by the affidavits of Kirkwood, one of the attorneys for the defendant, and of the defendant himself. The affidavit of Kirkwood is particular in regard to the excitement and prejudice in Virginia City, the county seat of Madison county. An affidavit to this effect is not sufficient. *People v. Baker*, 1 Cal. 403. This affidavit further states that "owing to the flaming reports heretofore printed in the newspapers," he finds a deep-rooted prejudice against the defendant in various portions of the county. This does not show that there is a prejudice against the defendant in the whole county or any great portion of it. Perhaps nothing so much militates against the affidavit of Kirkwood, and tends so thoroughly to destroy its force, as the fact that he attributes to public prejudice against his client the searching of himself by the officers in charge of defendant, that they might learn that he was not carrying to his client the means of escape. No such inference can be drawn from that. The defendant asserts in his affidavit that the prejudice created in the minds of the people against him was caused by certain articles published in *The Madisonian*, a newspaper published in Virginia City. With us, the newspaper press is free and every newspaper publishes any facts made public concerning the commission of any crime in the community where it exists, and every other paper in the Territory copies the same. It is not believed that the citizens of any community in this Territory have a pre-eminence over those of another as the readers of newspapers. Nor is it thought that any newspaper in this Territory has much greater influence in the county where it is published than in other portions of the Territory where it circulates. If there is prejudice in one county on account of newspaper articles alone, unaccompanied with any

other local influence, I think it would be difficult to find any other county in the Territory where the same prejudice had not been created. The change must be made to some county, if at all, where the cause complained of does not exist. Codified Statutes, p. 224, § 225. The court is not bound to believe what is improbable. The defendant does not offer to show that in fact the jury was prejudiced against him, or that it acted unfairly, and there seems to have been no great difficulty in procuring an unprejudiced jury. From appellant's brief it appears that not more than thirty-six persons were called before a jury, which satisfied the requirements of the law were found. This was not an unusual number in so important a case. The affidavits did not show that there was any prejudice against defendant save on account of the charge in this case.

It is usually considered a privilege for a person charged with a crime to be tried in the county where he has resided for years, and a change of venue should not be granted to such a person without the most satisfactory showing of prejudice against him. I find no abuse of discretion in refusing this application.

There is no validity in the point that Sarah Parker ought not to have been allowed to testify until the district attorney had complied with the common-law usage of asking the permission of the court to dismiss the charge against her, and the privilege of introducing her. Under our statutes (see Codified Statutes, p. 271, § 14), an accomplice may be called upon to testify against his accomplice whether he gives his consent or not. He is treated as any other witness save that his credibility may be affected by the fact that he is charged with the same offense as the person against whom he testifies.

It is very evident that the above statute does not contemplate that the charge against an accomplice who is called as a witness should be dismissed, or that any permission of the court is required to introduce him.

The defendant complains because the court below would not hear any argument upon the right to introduce this witness. When a court is satisfied upon a point, it is certainly not error to refuse to allow its time to be consumed with an argument

thereon. This is the first time I have ever heard such a point having been seriously presented to an appellate court as a ground of error. The defendant makes objection to several instructions given by the court on the ground that there is no law in this territory declaring any marriage incestuous and void, and because there is no such crime as fornication known to the laws. These questions have been fully considered in determining the validity of the indictment, and will not again be reviewed. There is an objection to one of the instructions because the phrase "alleged accomplice," is used in regard to the witness, Sarah Parker, for the reason that it might mislead the jury. That is, I suppose, by causing them to think there might be some doubt as to her being an accomplice. Undoubtedly the reason that the court used such guarded language was because he desired to leave the question to the jury as to whether or not she was an accomplice. Had he stated positively as a fact that she was an accomplice, then inferentially he would have declared as a fact that the defendant was guilty. There certainly can be no error in a court using such guarded language when such considerations are presented. The court properly refused to give instruction number seven, specified in appellant's brief, for the reason that it was not law. It was based upon the assumption that all that was necessary to constitute the guilt of the defendant and to make Sarah Parker an accomplice was carnal intercourse between them. It left out of view the further facts the jury were compelled to find, that defendant and witness were related within the degrees of consanguinity in which marriage is declared incestuous and void, and knew this fact. Perhaps no one would have complained more of such an instruction, had it been given, than the counsel for the defense. I think also the point sought to be presented by this instruction had been fully covered by other instructions. It is urged that the court erred in overruling defendant's motion for a new trial for the reason that the witness, Sarah Parker, was not corroborated on some of the material issues in the case. I have examined the testimony presented in the record, and find that she was corroborated on every material issue in the case, save the one of the defendant being an unmar-

ried man, if this can be considered a material issue. As to sexual intercourse she was corroborated by Doctors Yager and Smith. As to the fact of the defendant and witness being half-brother and sister, and that they knew this, by Parker and Yager and a letter of defendants. If the allegation of defendant being unmarried was a material one, the defendant would have no right to a new trial, because the witness was not corroborated on this point, for the rule of law is that an accomplice need not be corroborated on every item of testimony given by the same. 1 Greenl. on Ev., § 381, and note 1; 1 Phill. on Ev., marg. p. 114. The evidence of Doctors Yager and Smith was properly admitted. The statutes of this Territory provide that a physician shall not testify without the consent of the patient as to any information he may have acquired while attending the same. Codified Statutes, p. 125, § 450. Sarah Parker and not John Corbett was the patient, and she gave her consent, and that was sufficient to make them competent witnesses.

Physicians were not exempted at common law from disclosing confidential communications, confided to them in their professional character. Greenl. on Ev., § 247; Phill. on Ev., marg. p. 136. We are therefore confined strictly to the words of the statute in considering this point, and that, we have seen, limits the confidential communications to those made by the patient to the physician in his professional character, and were necessary to enable him to prescribe for the same. The communications made to Doctors Yager and Smith by the defendant do not come within the exemption specified in the statutes. The admission of the evidence of Parker was proper, although his name was not indorsed on the back of the indictment. Codified Statutes, p. 214, § 157. The application for a new trial should be made before judgment is entered. Codified Statutes, p. 243, § 354. But there is nothing in the statute that requires that this motion should be heard before judgment, and I think the usual practice of the courts of this Territory has been to hear it afterward. Certainly the defendant would lose no right by such a practice. The motion in arrest of judgment in its very nature, and according to the statutes of the Territory, and the practice at common law

should be made and heard before the entry of judgment. Codified Statutes, p. 243, § 356; Archbold's Crim. Pl. & Pr. 671-2 and note.

From the record it clearly appears that the motion in arrest of judgment was made after the same was entered. The motion was not then made in time. 1 Archbold's Crim. Pl. & Pr. 672; Bishop on Crim. Proc., § 1107.

If the motion was not made in time, there was no error in the court disregarding it or overruling it. It may also be observed that no point was presented in the motion in arrest of judgment that was not presented on the demurrer to the indictment, and considered by that court and this. Hence the defendant was in no manner prejudiced by the action of the court in this matter.

I have considered many points in this case at considerable length that would not otherwise have been so treated had not the same been presented with much sincerity and earnestness by the counsel for defendant, and had not this been a criminal action in which the liberty of a man was involved. The judgment of the court below is affirmed with costs.

*Judgment affirmed.*

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MISSOULA COUNTY, appellant, v. EDWARDS, respondent.

BOND OF COUNTY TREASURER—*liability of sureties.* A. was the county treasurer of Missoula county, and executed a bond December 9, 1873, which was duly filed and approved. Some of the sureties wishing to be released therefrom, another bond was executed, filed and approved July 12, 1875. A settlement took place between the county commissioners and A. September 7, 1875, when the second bond was accepted in lieu of the first. A.'s official term expired March 5, 1876, and there was a deficiency in his accounts as treasurer. This action was commenced against the sureties upon the first bond to recover the amount of the deficiency, and judgment was entered in their favor. *Held*, that the sureties on the first bond are not liable for any deficiency occurring in A.'s accounts after September 7, 1875, and that the sureties on the second bond are liable therefor.

*Appeal from Second District, Missoula County.*

THIS action was tried by KNOWLES, J.

A. E. MAYHEW, district attorney, second district, for appellant.

The county commissioners of Missoula county had no authority to substitute the second bond for the first one. Their duties are defined by the statutes, which do not confer this power. Codified Statutes, 451, § 87; 452, § 90; 1 Dill. Mun. Corp. 173, § 55; *Hornblower v. Duden*, 35 Cal. 664.

SHARP & NAPTON, for respondents.

The county commissioners had the power to accept the new bond in lieu of the old one. All the facts were found for respondents, and this is the only question. Codified Statutes, 435, § 14; 1 Dill. Mun. Corp. 274-276; *United States v. Tingey*, 5 Pet. 115; *Supervisors v. Coffinbury*, 1 Mich. 355; *People v. Johr*, 22 id. 461.

BLAKE, J. This action was commenced by the board of commissioners of Missoula county against the sureties upon the official bond of Edwards, the county treasurer. This bond was executed December 19, 1873, to the board of county commissioners, and filed and approved according to law, and Edwards entered afterward upon the discharge of his duties as such officer. Some of the respondents, who were sureties upon this bond, wished to be released from the same, and a new bond in proper form was executed, filed and approved July 12, 1875. A settlement between Edwards and the county commissioners was duly made September 7, 1875, when the new bond was accepted as a substitute for the original instrument. The term of Edwards expired March 5, 1876, when he failed to account for and pay over to his successor, \$2,475. This action was commenced against the sureties upon the first bond to recover the amount of the deficit. The court below rendered judgment for the respondents upon the ground that they had been released from liability by the execution and acceptance of the second bond.

There is only one legal question for our consideration: Could the county commissioners under the laws of this Territory accept the last bond of Edwards in lieu of the first? The county of Missoula is an organized county within this Territory, and a body

corporate and politic. It is empowered for definite purposes, which are enumerated in the statutes, and among which are the following: "To make all contracts, and to do all other acts in relation to the property and concerns necessary to the exercise of its corporate or administrative powers." Codified Statutes, 433, § 1. "The powers of a county as a body corporate and politic shall be exercised by a board of county commissioners therefor." Codified Statutes, 434, § 3. "The board of county commissioners of each county shall have power at any meeting \* \* \* to examine and settle all accounts of the receipts and expenses of the county, and to examine, settle and allow all accounts chargeable against the county \* \* \* to represent the county, and have the care of the county property, and the management of the business and concerns of the county in all cases where no other provision is made by law." Codified Statutes, 435, § 14. The county treasurer is required to "execute to the board of county commissioners of his county a bond with three or more sufficient sureties, to be approved by the board, and in such penal sum as they may direct; which bond, with the approval of the board indorsed thereon by their clerk, shall be filed in the office of the county clerk." Codified Statutes, 451, § 87. It is the duty of the county treasurer to collect, receive and pay out "all moneys belonging to his county." Codified Statutes, 452, § 92. He is also the collector of taxes in his county. Codified Statutes, 453, § 96.

There is no statute which expressly authorizes the county commissioners to require or accept new bonds of the county treasurer. The bond may be approved by the chairman and clerk of the board of county commissioners, when it is not presented at a regular meeting of the board. In case of a vacancy or disability in the office of county treasurer, the board may in their discretion appoint a person to perform the duties, and this party is required to give a bond similar to that of this officer. When the bond has been given, this person is "invested with all the duties of such treasurer until such vacancy shall be filled or \* \* \* such disability be removed." Codified Statutes, 452, § 90.

The board of county commissioners fix the penalty of the bond of the county treasurer and decide upon the sufficiency of

the sureties; and the same is executed to the board of county commissioners for the use and benefit of the county. The object of the statutes, which have been referred to, is the protection of the county against any loss through the failure of the county treasurer to perform faithfully his official duties. The failure of the county treasurer to pay out according to law the moneys of the county defeats the objects for which the county has been organized. If the county commissioners cannot obtain these moneys by reason of the insolvency of the sureties, or a fatal defect in the bond, the corporate or administrative powers of the county cannot be exercised. There is only one remedy for this state of things, and that is the execution of a new bond, which is good and sufficient, by the county treasurer. This appears to be one of the cases "where no other provision is made by law." The execution of the new bond is "necessary to the exercise" of the "corporate or administrative powers" of the county. The transcript does not disclose the reasons which controlled the action of the county commissioners in demanding the second bond from Edwards, although it appears that some of the respondents took the first steps to bring about this result. The good faith of the commissioners is not questioned by the respondents, or any of the parties, and this part of the investigation is immaterial.

It has been held in North Carolina that the county commissioners may require a sheriff to renew his bond, when the sureties on the first bond become insolvent; and upon his refusal to comply with the order, may declare the office vacant. *People v. Green*, 75 N. C. 329.

Can an action be maintained on the second bond given by Edwards? The determination of this inquiry is necessarily involved in the matters that have been discussed. Have the rights of the county of Missoula been impaired by the official action of the county commissioners? In *United States v. Tingey*, 5 Pet. 115, Mr. Justice STORY says: "We hold that a voluntary bond taken by authority of the proper officers of the treasury department, to whom the disbursement of public moneys is intrusted, to secure the fidelity in official duties of a receiver or an agent for disbursing of public moneys, is a binding contract between him

and his sureties and the United States, although such bond may not be prescribed or required by any positive law. The right to take such a bond is, in our view, an incident to the duties belonging to such a department; and the United States, having a political capacity to take it, we see no objection to its validity in a moral or a legal view."

We find in Judge DILLON's work on Municipal Corporations, the following note: "A bond given by the treasurer of a county for the faithful performance of his official duties, to the board of supervisors of the same county, is a good and valid bond, notwithstanding there may be no statute requiring one. *Supervisors v. Coffinbury*, 1 Mich. 355; *People v. Johr*, 22 id. 461." 1 Dill. Mun. Corp. (2d ed.), § 155. In *Sweetser v. Hay*, 2 Gray, 49, Mr. Justice METCALF says: "Actions have been supported on bonds which no law required when they were executed voluntarily, and with proper conditions, to secure the performance of official duty. *Postmaster-General v. Rice*, Gilpin, 554; *Montville v. Haughton*, 7 Conn. 543; *Commonwealth v. Wolbert*, 6 Binn. 292."

We are satisfied that two valid bonds have been given by Edwards and the liability of the sureties is determined without difficulty. The principles which are applied when two bonds have been accepted from a person holding an office during two successive terms are decisive of this case. It has been uniformly held that the sureties upon one bond are not responsible for a default of the principal committed during the time that he was discharging his official duties by virtue of another bond. *United States v. Kirkpatrick*, 9 Wheat. 720; *Bruce v. United States*, 17 How. 437; *United States v. Earhart*, 4 Saw. 245; *United States v. Ellis*, id. 590.

The sureties upon the second bond of Edwards are liable for any deficit which occurred after the filing and acceptance of their obligation. It appears that the cause of this action accrued since that date, and their liability is fixed. The sureties upon the original bond of Edwards have been released from the same by the action of the county commissioners.

*Judgment affirmed.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1878.

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Present :

Hon. DECIUS S. WADE, CHIEF JUSTICE.  
Hon. HIRAM KNOWLES, } JUSTICES.  
Hon. HENRY N. BLAKE, }

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BELK, appellant, v. MEAGHER ET AL., respondents.

EVIDENCE — *district records*. When the original record books of a mining district are proved to have been lost, a copy of such records, made by a deputy recorder, under a law requiring district records to be filed in the county recorder's office, in a book which has been recognized by usage and preserved in the recorder's office, is better evidence of location appearing therein than the bare memory of witnesses, and the best that the nature of the case admits.

WITNESSES TO A DEED — *acknowledgment — certificate*. Under the statutes of Montana pertaining to conveyances, no subscribing witnesses are required to a deed, when the same is properly acknowledged. A deed may be entitled to record by proof of witnesses without acknowledgment. When by either method it is once recorded, it is good notice to third parties.

MINERAL LAND ACT — *how title acquired and preserved — nature of title — forfeiture*. Under the act of congress of May 10, 1872, representation by

annual performance of labor is constituted one of the muniments of title. No forfeiture can take place till after the full completion of the year, during which, by law, representation may be made.

The right acquired by a locator of mineral ground on the public domain, acting in accordance with the provisions of law and local laws, rules and regulations, is a legal and exclusive right of possession, and so long as this right is kept alive by representation, no one else has the right to enter upon and re-locate the same. Such entry and re-location would be void and constitute no foundation to a valid claim or give any right of possession.

When the original locator and his grantees have failed to represent a claim by doing the work required during any one full year, he who first locates the same, after the expiration of the year, acquires the best title thereto.

*Appeal from Second District, Deer Lodge County.*

J. F. FORBIS, A. E. MAYHEW, SHARP & NAPTON, and E. W. TOOLE, for appellant.

The court below erred in admitting copy of records of Summit Valley Mining District. There is no law authorizing copies of such district records to be received as evidence. There was no evidence of the copy being correct, either by the party who copied it or by any one who compared it afterward.

The deeds showing outstanding title in Murphy should not have been admitted in evidence; they were not witnessed or properly acknowledged. Codified Statutes, 396, §§ 1, 3, 23; 4 Am. Rep. 430; 6 Wheat. 577; 2 Mont. 59; 3 N. H. 234; 5 Ohio, 190; 82 Mass. 48; 22 Pick. 295.

These deeds, if admissible, could only have established an equitable title, unavailable to a stranger seeking to evict a third party. 5 Ham. (Ohio) 194.

The occupant of mineral land under the United States laws, before a patent issues, has only an inchoate title, a possessory right. See 4 Otto, 762. The absolute title is in the United States. In this action it is incompetent for defendants to show title in the government or a stranger. The object of the action is to show that the entry was a trespass on the rights of the true owner. Such title is unavailable to defendants. 10 Cal. 30; 24 id. 347-8; 28 id. 323-4. 218; 47 id. 257; 45 id. 101-5; 38 id. 370; Tyler on Ejectment, 72-4.

The court erred in refusing the testimony of McFarland

It was error to allow defendants to testify as to amount of work done and money expended by them while in possession. Such evidence did not affect the title. 42 Cal. 407 ; 38 id. 278 ; 2 Col. 19 ; 37 N. Y. 407.

The stale claim of Murphy to the original lode ought not to have been allowed to figure at all in this case.

Even if Murphy's claim had not been forfeited at the time of plaintiff's location, it became so while he was in possession and two months before defendants' entry.

Murphy's claim was not only forfeited under the laws of the United States, but was barred by the Statute of Limitations. Codified Statutes, 591-2 ; 2 Mont. 394 ; U. S. Rev. Stat. 427, § 2324 ; 2 Black (U. S.), 605 ; 9 Nev. ; 43 Cal. 65, 73, 251-2.

If the plaintiff's right of possession was good against the claimants of the original lode, it ought to be still stronger as against the defendants.

The plaintiff was first in time and should be first in right as against defendants and all others.

W. W. DIXON and J. C. ROBINSON, for defendants.

The district records of Summit Valley district were properly admitted in evidence. Having shown that the original record was lost, that the copy offered was made by one duly in charge as deputy recorder, it devolves upon plaintiff to show that it was not a correct copy.

All district records existing in December, 1864, and deposited with county recorder prior to April 17, 1865, became county records. Bannack Statutes of 1864-5, 374 ; also same statutes, 328.

The deeds were properly admitted in evidence. A deed under our statute does not require witnesses, and as between parties thereto, is good without acknowledgment. 3 Washb. Real Prop. 321, and authorities there cited ; *Sanders v. Bolton*, 26 Cal. 393 ; *Hastings v. Vaughn*, 5 id. 315 ; *Ricks v. Reed*, 19 id. 551 ; 4 Kent, 456 ; 1 Mont. 688.

Whatever may be held as to the title conveyed by the deeds there was representation in 1875 by Humphreys, one of the first locators.

Defendants do not attempt to show outstanding title in a third party, but simply to show that the original location was kept alive and had not been forfeited at the time of plaintiff's attempted location. At that time there was nothing for the United States to grant or for plaintiff to locate. *Reid v. Disbrow*, 9 Cal. 1; *Dyson v. Bradshaw*, 23 id. 528; *Roberts v. Chan Tin Pen*, 23 id. 260.

It was competent for defendants to prove the work done after location as evidence of possession and good faith.

When a party admits testimony without objection, he cannot afterward move to strike it out. *People v. Long*, 43 Cal. 444.

A location made before a forfeiture accrued is void. U. S. Mining Decisions, 188; Weeks on Mineral Lands, 109, 150, 157; *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30.

The law operates as a grant to persons qualified to take it. *Robertson v. Smith*, 1 Mont. 410.

The law requiring work makes a condition subsequent to the grant. *King v. Edwards*, 1 Mont. 235.

Breach of condition subsequent does not defeat estate until entry by grantor or his heirs. The entry must be subsequent to the breach. No advantage can be taken of a breach of condition while one is in wrongful possession. 1 Washb. Real Prop. 477; 2 Greenl. Ev., § 323.

The Statute of Limitations could not affect a right given by act of congress—it only goes to the remedy. Before plaintiff could acquire any right of action under the statute he must have held adverse possession for one year.

WADE, C. J. In this action the plaintiff avers that he is the owner of and entitled to the possession of a certain quartz lode claim known as the Anna Maria lode claim, situate in the Summit Valley mining district, Deer Lodge county, which claim of ownership is disputed by defendants, who, as the plaintiff alleges, are now wrongfully in the possession, claiming title, and in order to a proper solution of the questions of law arising in the case, a statement of facts becomes necessary.

It appears from the evidence that on the 19th day of December, 1876, the plaintiff located the ground in dispute, after having

discovered a lead thereon, by posting notices of location and marking the boundaries thereof as the law requires, which notice of location was on the 21st day of December, 1876, filed for record in the recorder's office of Deer Lodge county. Subsequently to the location of the claim, the plaintiff worked thereon at different times, in all amounting to about two days' work, the last of which work was performed on or about the 15th day of February, 1877. It further appears that the defendants, Henry Meagher and Antoine Gagnon, on the 21st day of February, 1877, located the ground in question, after the discovery of a lead thereon, under the name of the Gagnon lode claim, by posting notices of location and marking the boundaries thereof, and have since their location worked and mined the claim.

The defendants, to defeat the title of the plaintiff, and to show that at the time he made his location and claim to the ground in dispute the same was not subject to location, but on the contrary that the possessory right and title to the same was held and owned by third persons, by virtue of a location long prior to that of the plaintiff, which right had been kept alive and in full force by proper representation and labor thereon, and therefore that the alleged right and title of the plaintiff was void, introduced in evidence and established the following facts, which appear from the testimony of William O. Humphrey as follows :

"I am acquainted with the ground in dispute and with the old original lode; I know the ground Mr. Clarke now owns and also the ground of the National Mining and Exploring Company. Am acquainted with the ground lying between these claims. The ground here in dispute is what is known as the west one-half of Discovery claim, claim No. 1, and part of claim No. 2, west from Discovery on original lode. These claims were located by William Allison and myself; we located Discovery claim and claims Nos. 1 and 2 west. We staked and recorded these claims; the hole I sunk there is on west half of Discovery claim. I think we located claims in July or August, 1864. When I sunk Discovery hole I found a pretty good copper vein carrying silver; I found what I call wall-rock, and staked the ground. I think we put up a stake at each end of

Discovery claim, and a stake at the end of every 200 feet claim after. We put up notice claiming Discovery claim, and claims 1 and 2 west. We recorded claims in district records on sheets of paper attached together in book form, and it was understood at the time that the district records were made on slips of paper, that they were to be copied into a book as soon as we got one. This (referring to a book of records taken from the county recorder's office) was the first book we got, and it was copied into this book which was the first book of county records, and these records were afterward copied into the county recorder's records. I was county recorder and turned records over to Judge LEWIS, my successor. I would know district records if I could see them (records produced); I think that is the book; I think the hand writing in the book is that of Mr. Fisk, he was doing work for me. I believe this is the book in which district records were copied. I think this is the book I had when county recorder. Mr. Fisk was deputy recorder and did most of the work. I wont be positive that the original lode was recorded in this book, it may be that it was recorded in a smaller book, used for district record, and then copied in this book. Mr. Allison was district recorder, I think, when original lode was recorded. These district records were kept until a county recorder was appointed. I was appointed county recorder by Governor Edgerton; I think I received my appointment about December, 1864. Part of the book is copied from district records. District records were delivered to me when I was appointed county recorder. All that was in old district records up to time of my appointment was copied into this book. We issued certificates of location from such records copied into this book. The signature in back of book purporting to be mine is not mine. I think same party that signed the rest signed my name (referring to page 30, witness said) I wrote name of G. O. Humphrey on this page, but no other names that appear on page. I cannot say why I have written some and other parties have written rest. I think district records were copied just as they appeared on old records; I turned this book over to Judge LEWIS, county recorder, who was my successor, in the winter of 1864-5 or spring of 1865. These

books were recognized as the records of the district by the miners generally. I gave the book to Judge E. E. LEWIS, county recorder, at Butte or Silver Bow; he moved his office from Butte to Silver Bow. The county seat was where the records were. I was appointed county recorder by Governor Edgerton, during session of legislature, I think about December, 1864. I think I entered upon the discharge of my duties about one month after my appointment. I did some recording in district records after I was county recorder and made entries on record after my appointment. I can't fix date exactly when I delivered district records to Judge LEWIS, county recorder. This book is partly copied from old district records. I don't know what became of old district records after they were copied; I do not know where they are; I think they are lost, I haven't them in my possession. The old records were partly on slips of paper fastened together and made into book form, and then copied into this book. I think these slips are lost. They came into my possession in 1864; I got them as soon as I went into office; I think papers are not in existence; I think Mr. Fisk copied records of original lode. He was deputy recorder; I cannot say that I was present when he copied record or that I compared it; I think it is a true copy, but cannot say positively; I cannot say that I know it is a true copy; I think it is a true copy because Mr. Fisk copied it; I authorized him to make copy. If I had not thought Mr. Fisk would make correct copy, I would not have employed him. Mr. Fisk is somewhere in the eastern States.

Henry S. Clark testified: "I am county recorder of Deer Lodge county. This is one of the books of record in my office. I found this book in the office when I took charge of the office. I have no slips of paper attached together in book form or otherwise purporting to be the records of Summit Valley mining district."

The book was then received in evidence as containing a record of the location of the original lode and claims thereon.

It further appears that on the 22d day of June, 1872, by deed of that date, William Allison and wife conveyed to Joseph D. Binns all their interest in the original lode, being an undivided

one-half of the property described in the deed, except as to claim No. 2 west, which deed was signed and sealed by the grantors, but not witnessed, and the certificate of acknowledgment to the same was defective. On the 5th day of September, 1872, Binns, by his deed, conveyed to John C. C. Thornton, which deed was signed and sealed by the grantor, but not witnessed, and the certificate of acknowledgment to the same was also defective.

On the 31st day of May, 1872, G. O. Humphrey and others, by their deed of that date, conveyed their interest, being an undivided one-fourth interest in the property described in the deed, except as to claim No. 1, west, to John C. C. Thornton, which deed was properly signed and acknowledged, but the signatures thereto were not witnessed. The property described and conveyed in these deeds as parts of the original lode is a part of the same ground and property claimed by the plaintiff and defendants in their respective locations. In the spring of 1875, Thornton caused the ground and lead in question to be properly represented, and employed Humphrey and others to perform the necessary labor thereon for that purpose. On the 28th day of January, 1876, Thornton and wife conveyed to John T. Murphy, and neither Murphy nor Thornton represented the ground for 1876.

Upon these facts several questions arise. Was the book containing a record of the original lode properly received in evidence?

Were the deeds from Allison and wife to Binns, from Binns to Thornton, and from Humphrey and others to Thornton admissible in evidence? What interest does a person locating a mining claim upon the public mineral lands, in pursuance of the law and the local rules and regulations, acquire therein, and how is such interest kept alive so as to prevent a forfeiture and defeat a relocation?

1. As to the admissibility of the book of records. Several facts in this connection are not controverted. The act of the legislature of January 17, 1865, required all mining district records to be deposited in their respective county recorder's office, and when so deposited, that they become part and parcel of the county rec-

ords. Probably under the operation of this statute the district records of the Summit Valley district, which had been kept on sheets of paper fastened together in book form, found their way into the recorder's office of Deer Lodge county, and became a part of the records thereof. This district record contains the original record of the original lode and claims thereon. This record is lost. When it reached the office of the county recorder, that officer had it copied into a book of records which has since been recognized by the miners of the Summit Valley district as the record of such district, and from which certificates of location of claims issued. There is no direct proof that this record is a copy of the original. This book of records containing a record of the original lode was found in the office of and among the records of the county recorder. This is *prima facie* proof that the record is genuine and correct. Mr. Fisk was deputy recorder and probably sworn to a faithful discharge of his duties. He copied the old district record into the county record introduced in evidence, and though the recorder could not say that he was present when this copy was made, or that he had compared it, yet he believed it to be correct and it was so recognized.

Records when lost or destroyed may be proved either by copy or by the recollection of witnesses (1 Wharton on Evidence, § 135, and cases there cited), and the question we are to consider is whether or not the record, as introduced in evidence, was better evidence of the location of the original lode than the recollection of witnesses would have been? It was necessary to introduce the best evidence, and the original record being lost and the testimony tending strongly to show that the copy preserved in the county records is correct, we think such evidence better and of higher grade than would have been the bare memory of witnesses. We are satisfied that the record received in evidence as proof of the location of the original lode was the best evidence that the nature of the case admitted of, and therefore that it was properly received.

2. As to the admissibility of the deeds. The deeds from Allison and wife to Binns, and from Binns to Thornton were defectively acknowledged. We have held that the acknowledg-

ment is no part of a deed, and that as between the parties thereto, a deed would be good without any acknowledgments (*Taylor v. Holter et al.*, 1 Mont. 688), and as against third persons who were seeking to locate the ground, if the grantees in such defective conveyances had represented the ground named therein according to law, and a forfeiture had thereby been prevented, such deeds and representations would defeat any relocation of the ground.

The original location being valid and the ground having been represented as the law requires so that no forfeiture has occurred, a defective conveyance would not create a forfeiture and subject the ground to relocation. Even if the Allison and Binns' deeds were void and the deed from Humphrey to Thornton, being for an undivided one-fourth interest in the property, was valid, such deed would preserve the rights of Thornton to represent the ground and prevent a forfeiture.

There were no witnesses to the deed from Humphrey to Thornton. Did this fact invalidate the deed under our statute? The statute provides (Codified Statutes, p. 396, § 3): "Every conveyance in writing, whereby any real estate is conveyed or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided." The statute then provides who may take the proof of acknowledgment; requires the officer taking the same to grant a certificate thereof, which shall be indorsed or annexed to such conveyance; what the certificate shall contain and the form thereof. And section 10 is as follows: "The proof of the execution of any conveyance whereby any real estate is conveyed or affected shall be: *First*. By the testimony of a subscribing witness; or *Second*. When all the subscribing witnesses are dead or cannot be had, by evidence of the handwriting of the party, and at least one of the subscribing witnesses." The statute then provides in substance, that no proof of a subscribing witness shall be taken unless such witness be personally known to the officer taking the proof to be the person whose name is subscribed to the conveyance as a witness thereto, or shall be proved to be such by the oath or affirmation of a credible person; that no certificate of such proof shall be granted unless such subscribing witness shall prove that the person whose name is sub-

scribed thereto as a party is the person described in and who executed the same, and that such person executed the conveyance, and that such witness subscribed his name thereto as a witness thereof. The statute then provides what the certificate of such proof shall contain, and how the proof of the handwriting of the party, or of the subscribing witness, shall be taken. And section 18 is in the following words: "A certificate of the acknowledgment of any conveyance, *or the proof of the execution thereof*, as provided in this act, signed by the officer taking the same, and under the seal of the officer, shall entitle such conveyance, with the certificate or certificates as aforesaid, to be recorded in the office of the recorder of any county in this Territory."

The provisions of the statute when taken and construed together are not ambiguous or uncertain. It is evident that the object and purpose of the certificate of acknowledgment and also of proof of the execution of a deed, as the statute contemplates, is to authorize the deed to be recorded. In the absence of a certificate, and there being no proof of the execution of the deed, the same cannot be recorded; but either a certificate of acknowledgment or proof of execution under the statute, so authenticates the deed as to qualify it for record. And so when there is proof of acknowledgment and a certificate thereof annexed or attached to the conveyance no witnesses are required and the conveyance is entitled to be recorded. And when there is no certificate of acknowledgment, but proof of the execution of the deed can be made by the subscribing witnesses thereto in the manner provided by the statute then the conveyance is also entitled to record. The object of the record of a deed, and hence of the certificate of acknowledgment and proof of the execution thereof, is to impart notice to third persons. And hence it follows that neither the certificate of acknowledgment nor the attestation of subscribing witnesses are necessary to the validity of a deed, as between the parties thereto, and in no case where there is proof of acknowledgment and a certificate thereof annexed or attached to a deed, and the same has been admitted to record by virtue of such certificate, are subscribing witnesses necessary to the validity of such deed as to third persons.

Section 24 of the same statute provides as follows: "Every conveyance and instrument in writing, acknowledged or *proved* and *certified* and recorded in the manner prescribed in this act from the time of filing the same with the recorder for record, shall impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice."

And so it is obvious from the statute, when taken as a whole and construed together, that the object of a certificate or proof of execution is to entitle a deed to record, and that when by virtue of such certificate or proof a deed is entered of record, and recorded, it is good and imparts notice to third persons, in the absence of a certificate of acknowledgment, but accompanied with proof of execution, or in absence of proof of execution, but accompanied with a certificate of acknowledgment.

It follows, therefore, that the deed from Humphrey to Thornton which had no subscribing or attesting witnesses, but was properly acknowledged as the statute requires and recorded, was good as between the parties thereto and as to third persons, and imparted notice to all the world.

3. This deed being good to all intents and purposes, and conveying to Thornton an interest in the property in question which he rightfully held and owned in the spring of 1875, when he caused the ground to be represented, it follows that he had the right to make such representation in order to protect and to save from forfeiture his interest in the property. Having made the representation in the spring of 1875, when, under the law, was it necessary for him again to represent the ground in order to prevent its relocation?

Section 5 of the act of congress of May 10, 1872, entitled "an act to promote the development of the mining resources of the United States," provides as follows: "On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than \$100 worth of labor shall be performed, or improvements made during each year. On all claims located prior to this act (which is applicable to the case we are considering) \$10 worth of labor

shall be performed or improvements made each year for each 100 feet in length along the vein until a patent shall have been issued therefor, but where such claims are held in common, such expenditure may be made upon any one claim, and upon failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made. Provided that the original locators, their heirs, assigns or legal representatives have not resumed work upon the claim after such failure and before such location."

Under this statute representation is the muniment of title. If representation fails the title is gone; if there is a forfeiture the claim becomes again subject to location unless after the forfeiture work is resumed before the rights of third parties intervene by relocation. On each claim located prior to the passage of this act, \$10 worth of work shall be performed or improvements made during each year for each 100 feet of such claim in order to prevent a relocation. The person making the location has one whole year in which to make the representation, and after having made one representation he has the whole of the next year in which to make the next representation. Having the whole year in which to make the representation, there can be no forfeiture until the full time has expired. If a claim is represented on the 30th day of December, 1877, such representation would save a forfeiture for that year, and would secure the party in his title until the 30th day of December, 1878, when the possibility of making representation for that year had expired. While the right of representation remains there can be no forfeiture, and so long as there is no forfeiture, the title of the person entitled to make representation is complete. The title only expires when the right to make representation is entirely gone.

Thornton having represented this ground in the spring of 1875, he or his grantee had the whole of the year 1876 in which to again represent it, and his rights thereto were not forfeited until the expiration of that year. It follows, therefore, that the location of the ground by plaintiff, on the 19th day of De-

ember, 1876, was made while yet the title of Thornton's grantee remained inviolate, and before there was any forfeiture of his right, whereby the claim became subject to relocation.

4. Thornton and his grantee having failed to represent the ground during the year 1876, did any rights thereby attach to the plaintiff by virtue of his location on the 19th day of December, 1876? And this leads us to an inquiry as to the nature and extent of the title of Thornton's grantee upon the day of the plaintiff's location. What estate or interest does a person acquire by locating a mining claim according to law upon the public mineral lands, and holding possession thereof in pursuance of the law by properly representing the same from year to year?

The first section of the act of congress of May 10, 1872, declares all valuable mineral deposits in lands belonging to the United States to be free and open to exploration and purchase by citizens of the United States, and those who have declared their intention to become such, under the rules prescribed by law, and according to the local customs or rules of the miners not in conflict therewith. The act defines the extent or quantity of the public lands that one person may occupy and hold as a mining claim, and section 3 provides: "That the locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode or ledge, situate on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States, and the State, Territorial and local regulations not in conflict with said laws of the United States governing their possessory title, shall have the exclusive right to possession and enjoyment of all surface ground included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, etc."

By the terms of this section the locator of a mining claim has a possessory title thereto, and the right to the exclusive possession and enjoyment thereof. These words imply property. The right to the exclusive possession and enjoyment of a mining claim includes the right to work it, to extract the mineral therefrom, to the exclusive property in such mineral

and the right to defend such possession. The right to the exclusive possession and enjoyment of property, accompanied with the right to acquire the absolute title thereto, presupposes a grant, and the instrument of this grant, as applied to mining claims upon the public lands, is the act of congress above referred to. This act being of general application to all the mineral lands belonging to the government, and conferring a title or easement therein upon the locator thereof, and vesting the right in him to become the absolute owner to the exclusion of all others, is a legislative grant, and being given by act of congress is equivalent to a patent from the United States to the same. The title thus conferred upon the locator of a mining claim is a legal title as distinguished from an equitable one, and such a title as would support an action in ejectment.

In construing a section of the act of congress of July 26, 1866, which gave the right to the citizens to explore and occupy the mineral lands of the public domain, subject to the law and the local rules and regulations, this court, in the case of *Robertson v. Smith*, 1 Mont. 414, used the following language: "We hold that this section of the act grants to the proper person an easement upon such of the mineral lands belonging to the public domain of the United States as he may appropriate in accordance with the local rules and customs of miners in the mining district in which the same may be situated."

On page 416, same case, the following: "These rules and customs refer to the location, user and forfeiture of mining claims. When a miner locates a particular portion of mining lands in accordance with the rules and customs, then the grant from the general government to occupy, explore and take therefrom the precious metals, accrues to such miner over the ground located. The effect of this statute then is to grant these rights over the ground located in accordance with such rules, to as full an extent as if the land had been designated in the law."

If this were true under the act of 1866, the principle applies with stronger force to the act of 1872, which, in addition to giving the right to occupy and explore, gave also the right of exclusive possession and enjoyment to the locator, his heirs and assigns.

The supreme court of the United States, in the case of *Forbes v. Gracey*, 94 U. S. 767, speaking of mining claims while held by possessory title and before a patent has been obtained, by MILLER, J., says: "These claims are the subject of bargain and sale, and constitute very largely the wealth of the Pacific coast States. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the States and the Federal government. These claims may be sold, transferred, mortgaged and inherited without infringing the title of the United States."

This is the kind of property that Humphrey and Allison, by their location, and their grantees by purchase, became possessed of in the mining claim in question, property capable of being bought and sold, mortgaged or inherited, and property that the act of 1872 granted to the locators of mining claims and their grantees, clothing them with the exclusive possession and enjoyment thereof. The government by its grant had conferred this property upon the grantors of Murphy, who became the owner on the 28th day of January, 1876, while yet the grant was effectual and in full force by virtue of the representation of the ground by Thornton in the spring of 1875, which representation of the ground prevented any forfeiture thereof until the first day of January, 1877.

The government having made this grant to these parties there was no room for a like grant of the same property to the plaintiff. The location of Humphrey and Allison being still alive on the 19th day of December, 1876, the date of plaintiff's location, the property on that day was not subject to location by the plaintiff. His location therefore was void, and his right to claim a grant from the government, depending wholly upon the validity of his location, it follows, therefore, that he acquired no interest in or right to the property. And the fact that eleven days subsequent to plaintiff's location the ground became forfeited by reason of the failure of Thornton and Murphy to represent the same, would not revive a void location or confer any rights upon the plaintiff. There is no grant from the government, under the

act of congress unless there is a location according to the law and the local rules and regulations. Such location is a condition precedent to the grant. Mere possession not based upon a valid location, would not prevent a valid location under the law. The plaintiff resting his sole right to the possession of the property upon his location of December 19, 1876, and that location being void, for the reason that the ground was not subject to location, and for the further reason that the government at that time had no possessory title to grant therein, having bestowed the same upon the grantees of Humphrey and Allison, the demand of the plaintiff to be restored to the possession of the property must fail, and the possession of the defendants having been acquired by virtue of their location in 1877, after this title of Thornton and Murphy had become forfeited by their failure to represent the ground in 1876, must prevail. The title of Murphy was not extinguished until January, 1877, though his right of action may have been barred by the Statute of Limitation, but as it is not necessary in this case, we make no decision upon this point.

As to the testimony of McFarland in relation to the amount of work performed upon the claims in dispute, it does not appear that he knew the lines of the claim himself, or that the man who told him knew the lines, and there was no offer to prove that this person who informed McFarland knew the lines of the claims. Under such circumstances there was no error in rejecting the testimony of McFarland as to the amount of work upon the claims for the reason that the witness had no means of knowing whether the work he saw was or not on the claims in dispute.

This view of the case renders it unnecessary for us to further pass upon the exception of plaintiff as to the testimony of McFarland on the question raised by the admission of testimony on behalf of the defendants as to the amount of labor performed by them on the claims after their location thereof.

Judgment affirmed with costs.

*Judgment affirmed.*

## TERRITORY, respondent, v. DEEGAN, appellant.

*TOWN-SITE — dedication of street — statute of limitations — remedy of occupant.* A. occupied and inclosed in 1866, a tract of land in Helena, and possessed it until the commencement of this action in November, 1876. The plat of the town-site of Helena, designating a street and alley on said land, was filed and approved in 1869, but the fences and buildings were never removed. In 1869, after the publication of the notice in the newspapers as required by law, A. filed applications with the trustee of the town-site and received deeds to the part of the tract which was not included within a street or alley. A. never filed applications for any part of the street or alley, although he had valuable improvements thereon, and accepted deeds which described lots bounding on said street or alley. A. was indicted for obstructing the street and alley. The act of the legislative assembly of the Territory, relating to town-sites, prescribes the time within which the claimants to lots must assert their rights thereto, and gives them a right of appeal to the district court. The statute provides further that the streets and alleys designated in the plat of the town, after the filing of the plat in the proper office, "shall remain dedicated to public use forever." *Held*, that A. was confined to his statutory remedy to obtain said land, and could not assert any title to the street or alley after the plat had been filed and accepted, and the time limited by law had expired. *Held*, also, that the Statute of Limitations of the Territory does not affect the right of the public to the use of the street and alley, and that A. was indicted properly for obstructing the same by maintaining his fences and buildings which had been erected in 1866.

*Appeal from Second District, Deer Lodge County.*

THIS action was tried by KNOWLES, J., without a jury. The subject of controversy was situated in the third judicial district, and the place of trial was changed by reason of WADE, C. J. being disqualified.

CHUMASERO & CHADWICK, for appellant.

The facts of this case warranted no conviction and the judgment below was erroneous for the following reasons :

The appellant had the right to enter upon the premises in question and acquire good title against all save the United States. U. S. Rev. Sts., §§ 2257-8, 2382.

Under the act of March 1, 1867, no rights acquired under the

above acts could be taken away or interfered with by the public officers therein named. U. S. Sts., §§ 2387-9, 2392; Cod. Sts. 547, §§ 3-4.

Under the United States law of 1867, the probate judge had no authority to lay out or create a street or alley where none had previously existed. Such have been the decisions of California and Montana; *Jones v. Petaluma*, 36 Cal. 230; *Aleman v. Petaluma*, 38 id. 554; *Hall v. Ashby*, 2 Mon. 489.

The authorities named in the acts of congress can exercise no powers not expressly conferred, and are to be strictly construed. *Ming v. Truett*, 1 Mon. 322; *Edwards v. Tracy*, 2 id. 49; *Denver v. Kent*, 1 Col. 336, and cases above cited.

Under former decisions of California and Montana, the probate judge had no power to convert the land of appellant into streets and alleys, and judgment of court below must be reversed.

The premises in question belonged to appellant absolutely save as against the United States, and could not be taken for public use only by legal condemnation and due compensation made.

The probate judge had no authority under the law to condemn land for such public use. See *Robertson v. Smith*, 1 Mon. 410, and authorities there cited.

J. K. TOOLE, district attorney, Third District, and SANDERS & CULLEN, for respondents.

The case may be conveniently considered under the following heads:

1st. Is the property described as an alley the property of appellant?

2d. If not, is it an alley or way?

3d. Did appellant obstruct it as alleged?

The last point is conceded, and the others only need to be considered. As to the first of the above points respondent claims that *locus* is not the property of appellant.

The title is not in him but is in the probate judge as trustee, as are all the other streets, alleys and squares of the town.

Appellant's rights were created by the "Act for the relief of the

inhabitants of cities and towns upon the public domain," approved March 2, 1867, and the act amendatory thereof, approved January 8, 1868, and chapter 57 of the Codified Statutes, p. 546, which being expressly authorized are the creation of the right and the sole method of its protection and enforcement, and he has waived all his rights to the premises not only by omitting to do what the law prescribed he should do to secure and protect his right, but by affirmatively ratifying what the probate judge and county commissioners did do.

Appellant did not comply with section 7 of town-site act, of unquestioned validity, and which, in the nature of a statute of limitations prescribes how the right shall be secured, which the legislation of congress and the Territory had granted as an inchoate claim, to be ripened in this manner and no other, into an absolute and indefeasible right.

Appellant says in effect: "I will accept the right you give, but will not comply with the terms on which it is granted."

The government being the absolute owner of this property has said: "Here is a right which we have to give and here are the terms with which you must comply to acquire it;" and is answered: "I will accept the right, but not liking your terms, I will prescribe my own."

By section 9 of town-site act an inquiry is provided for as to whether the survey is proper and conformable to existing rights, and whether the awards made are consistent with such rights, and by section 12 an appeal is provided to the district court. Under sections 5 and 6 he files his statement of claim and hints no claim to the alleys. The probate judge awards him all that he claims and he makes no appeal as provided in section 12, and makes no complaint of ungenerous treatment for six years.

Appellant now claims that he then occupied these premises in dispute, with improvements and might then have shown the fact and secured a title thereto. But section 7 of said act limits the time for making such proof to six months from date of publication of notice; as this was not done, the facts are now immaterial.

All the lots in a town are charged with a lien to pay costs

of survey and entry, but appellant seeks to enjoy the property without paying any portion of such expense. He repudiates the law and the expense, leaving others to pay more than their share that he may have more than he asks for. Had appellant been absolute owner of the land and stood silently by and seen this ground taken for an alley without asserting his right, he would have been estopped from doing so thereafter. But he was no owner, only an occupant, charged with immediate duties if he had wished the exclusive enjoyment of these premises. These he neglects and seeks to enjoy the property without sharing the burdens of expense which the law intended should be borne by all lot owners in proportion to the ground occupied and claimed.

Next — Is this an alley?

An alley is a highway, usually not so wide, but possessing all the qualities of a highway, and is such in the contemplation of law. A probate judge has no power to create a highway; it is a legislative act which the general assembly may confide to subordinate local functionaries, such as county commissioners. But where the law gives to any authority the power of platting a town site and provides the method by which any wrong done can be remedied by rehearing or appeal, and such authority is exercised and roads laid, and the law provides that the approval or rejection of such plat be confided to any authority competent to lay out highways, and such authority approves the plat, it becomes a legal creation of a highway.

Against the creation of such highway either public authorities or any private person might have appealed under section 12, within the time limited, and so could the act of the probate judge in closing any street or alley. Where a right is given and a remedy prescribed in the same statute, the remedy is exclusive of every other and must be followed. Sedgwick on Stat. Const. 94, 111.

BLAKE, J. The appellant has been indicted and convicted of the crime of obstructing a street and alley within the town site of Helena. The facts were agreed upon in the court below and it is necessary for us to state those on which this opinion is based.

The appellant entered into the actual and exclusive possession of, and enclosed a part of the public domain in August, 1866, which was afterward included within the exterior limits of the town site of Helena. No street or alley had been marked and used or traveled on upon this tract before the town site was surveyed. The ways, which are mentioned in the indictment, were surveyed and the plat designating them on the town site was accepted and filed by the proper officers in 1869. The appellant has not been disturbed in the possession of the land on which the street and alley are located, and his fences and buildings standing thereon have not been removed since 1866. In 1869, after the publication of the official notice in the newspaper according to law, the appellant filed with the trustee of the town site seven applications for the lots which had been surveyed on this tract, and afterward received deeds to the same. No portion of the land, which is included within the street and alley, was described in the application or the deeds, and neither the appellant, nor any other person, ever filed any application therefor or received a deed to it. At the time when the town site was surveyed and the plat was accepted and filed, the appellant owned valuable improvements consisting of fences, sheds and corrals, which were situated on the land that had been designated as a street and alley.

The appellant admits that he erected and maintains the obstructions which are specified in the indictment, but denies that the street and alley have been established according to the statutes of the Territory, and claims the premises in dispute as his private property. The appellant relies on the case of *Hall v. Ashby*, 2 Mon. 489, and the authorities there cited to support his position. This court held that the trustee of a town site had no power to create an alley which had not been designated upon the plat of the town site of Helena, but this principle is not applicable to the facts before us and therefore is not decisive of this action.

Some sections of the act of the legislative assembly concerning town sites have been cited and construed by this court in the case of *Schnepel v. Mellen*, *post*, and we comment upon them in brief terms. The claimants of town lots are required to file in the

office of the trustee a statement of their claims within two months from the date of the first publication of the notice in the newspaper. Cod. Sts. 548, § 5. The claimants of lots must make proof of their claims and pay for them within six months from and after the expiration of the notice. § 7. The claimants who feel aggrieved by the decision of the trustee have the right to appeal to the district court. § 12. After the plat of the town has been accepted and filed in the office of the proper county recorder "the streets and alleys designated in such plat shall remain dedicated to public use forever." § 4.

The indictment was filed in the court below, November 8, 1876. If the dedication of the street and alley has been extinguished by the adverse possession of the appellant, the indictment has been improperly found. Upon this subject the authorities are conflicting, but the intention of the law-making power in defining the acts by which the street and alley have been "dedicated to public use forever" can be carried into effect by following the decisions of the supreme court of California. In *Hoadley v. San Francisco*, 50 Cal. 265, Mr. Justice RHODES in the opinion says:

"When lands have been held adversely under such circumstances and for such a period that the title held by a private person, or by a municipality, or by the State as a private proprietor, would be extinguished under the operation of the Statute of Limitations, will such adverse possession also extinguish a public use if the lands have been dedicated to that purpose; will it also bar the rights which the public gained by the dedication? We are of the opinion that the question must be answered in the negative. The Statute of Limitations was not intended as a bar to the assertion by the public of rights of that character."

To the same effect are *Sawyer v. San Francisco*, 50 Cal. 370; *San Francisco v. Sullivan*, 50 id. 603.\*

Have the rights of the appellant been affected by his failure to file at the appropriate time an application with the trustee of the

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\*After this decision had been made, the case of *People v. Pope*, 53 Cal. 437, was published, and the court holds that "no one can acquire by adverse occupation, as against the public, the right to obstruct a street dedicated to public use, and thus prevent the use of it as a public highway."—B.

town site for a deed to the street and alley under the laws of the Territory? It is presumed that the appellant knew that the street and alley would be dedicated to the "public use forever," if he did not take the proper steps to vindicate his title thereto. He has not asserted his claim to this property in the manner prescribed by law, and has applied for and received deeds to certain lots which are bounded by the street and alley. It is maintained that the authorities of the town site have not been clothed with the power to take the property of the appellant for public purposes without condemnation and giving him compensation. There is no necessity for us to express an opinion upon this question, because we think that this case depends on the point we will now consider.

In *Dudley v. Mayhew*, 3 N. Y. 15, Mr. Justice STRONG says: "It is very clear that when a party is confined to a statutory remedy, he must take it as it is conferred; and that where the enforcing tribunal is specified, the designation forms a part of the remedy, and all others are excluded. \* \* \* The principle that where a statute confers a right, and prescribes adequate means for protecting it, the proprietor is confined to the statutory remedy, is conformable to the manifest intention of the legislature in such cases, and has therefore been properly settled in the courts of England and in this country." In *Coffield v. McClellan*, 1 Col. 373, Mr. Justice WELLS says: "We are of opinion, therefore, that every person who, in virtue of an occupancy or improvement existing at the date of the entry of the town site, or prior thereto, seeks to bring in question the right of one holding by conveyance from the trustee, must show affirmatively a compliance on his part with the requirements of the fourth section of the act of the Territorial legislature of March 11, 1864, or at least must excuse his failure to comply therewith."

The fourth section of the act, which is mentioned, contains provisions which are similar to those of the act relating to town sites in the Territory, *supra*. It required the claimants of lots in the town site of Denver to file their application with certain officers within ninety days after the first publication of a notice. Our statute provides that no proof by the claimants of lots shall be

permitted to be made after the expiration of six months from the publication of the notice. Cod. Sts. 548, § 7. The case of *Coffield v. McClellan*, *supra*, was affirmed by the supreme court of the United States, 16 Wall. 331.

The appellant does not attempt to excuse his failure to comply with the Town Site Act, *supra*. After the acceptance and filing of the plat, and before the finding of the indictment, a period of six years, the public acquired a right to enjoy the street and alley, which have been obstructed by the appellant. Upon the trial, the appellant could not plead as a defense that he occupied the premises, or question the action of the trustee of the town site. He had slept upon the rights which he then maintained. The statute established one tribunal, to which the appellant was compelled to resort to obtain a valid title to the property in controversy, and the district court, in which this action was tried, had no original jurisdiction in these matters. The appellant had no remedy at common law, and the statute pointed out clearly his sole mode of proceeding.

It has been held that the existence of a street in a town may be proved by showing that the owner has sold lots on opposite sides of a strip of ground suitable for a highway, and stood by and saw it used by the public as such; or that he stood by and permitted such user for a time, and under circumstances evidencing a dedication. *Gwynn v. Homan*, 15 Ind. 201; Angell on Highways, § 143. The appellant applied for deeds and paid for lots on opposite sides of the street and alley, and stood by and saw the authorities adopt the measures which were essential to create these highways. We might presume that he acquiesced in all the acts of the trustee of the town site, and thereby forfeited his claims after the rights of the public intervened.

KNOWLES, J., concurred.

WADE, C. J., being disqualified, did not participate in this decision.

*Judgment affirmed.*

## HIGLEY, respondent, v. GILMER ET AL., appellants.

**TERMS OF COURT—adjournment.** In the absence of any statute to the contrary, the district courts of the Territory have power to adjourn from time to time, though such adjournment should carry such term beyond the time fixed for holding court in another county in the same district.

**PLEADING — allegations of complaint — defense.** In an action for damages for injury of person, the plaintiff need not allege or prove that the same occurred without his fault or contributing neglect. Proof of such fault or neglect is proper matter of defense.

**COMMON CARRIERS OF PASSENGERS — degree of care — trespasser.** While common carriers of passengers for hire are held to the exercise of the highest degree of care, skill and diligence toward passengers who pay their fare, that a reasonable and skillful man can provide, ordinary care only is required toward deadheads and trespassers.

**PLEADING — contract — tort.** There is no longer any distinction in the essentials of pleading under the modern reformed system, between actions *ex contractu* and *ex delicto*.

**INSTRUCTIONS TO JURY — sufficiency.** A judgment will not be reversed for insufficiency or defect of a single instruction, if all the instructions taken together state the law correctly.

**EVIDENCE — admissibility.** Evidence of former accidents occurring under same driver is admissible to prove bad nature of roads or want of familiarity with them, but not as proof of negligence of driver at the time of the accident.

*Appeal from Third District, Lewis and Clarke County.*

THIS action was brought by plaintiff to recover damages for injuries received by the upsetting of defendants' stage coach. The action was tried at an adjourned session of the March term, 1877, of the third district court for Lewis and Clarke county. The jury gave verdict for plaintiff for \$5,000 damages, from which verdict and judgment thereon this appeal was brought.

E. W. TOOLE, and SANDERS & CULLEN, for appellants.

1. By order of supreme court, which is in the nature of legislation, a term of the district court for the third district was fixed to be held in Lewis and Clarke county, in March, 1877, and for Meagher county in same district, in April, 1877, and the judge

had no power to adjourn the former till after the latter, and the proceedings in this trial held at such adjourned term were without sanction of law. See Freeman on Judgments, § 121; *Wicks v. Ludwig*, 9 Cal. 175; *Norwood v. Kenfield*, 34 id. 333; *Smith v. Chichester*, 1 Cal. 409.

2. Complaint is defective, for that it contains no allegation that the injury occurred without plaintiff's fault, and that he did not contribute to the injury complained of. There was error in overruling defendants' demurrer. 17 Ind. 102; 101 Mass. 466; 105 id. 77; 16 Ill. 558; 29 Iowa, 531; 32 id. 176; 67 N. C. 122; 12 Pick. 177; 1 Williams (Vt.), 443; 19 Conn. 507; 18 Iowa, 280; 43 Me. 492; 25 Mich. 274; 7 Wis. 425-527.

3. The court erred in striking out part of defendants' answer which alleged that plaintiff was a trespasser and not a passenger. Only ordinary degree of care is required toward trespassers. One traveling on a free pass is not entitled to same degree of care as a passenger who pays. Chicago Legal News, Aug. 4, 1877, case 37; 12 East, 89; 5 Hurlst. & Norm. 147; Story on Bailments, p. 591; Angell on Carriers, p. 386, §§ 461-2, 434 to 442.

The case was brought for breach of contract, and pleadings and proof should have been made to conform to such issue. Central Law Journal, October 19, 1877, *Klanse v. St. Louis R.*; Chicago Legal News, Nov. 14, 1877, p. 78, *Stone v. C. & N. W. R. R. Co.*; Angell on Carriers, pp. 371, 439 to 443; 3 Barr. (Pa.) 342; 1 Chitty on Pleading (5th ed.), 334.

There was error in permitting proof of intoxication of driver, and of witness' opinions thereto. Angell on Carriers, p. 523, §§ 450, 582; *McKinney v. Neil*, 1 McLean, 540.

The court erred in not allowing defendants to cross-examine witness George Piatt, and show by him that the team used, though not the regular team, was equally as good.

The court erred further in not instructing the jury as asked by defendants respecting the duty of passengers in the matter of furnishing the driver intoxicants.

It erred also in not instructing the jury, as requested, that a passenger was bound to exercise diligence in avoiding peril; and in failing to instruct the jury that it was the driver's duty to act

on his own judgment and not on that of the passenger; and in instructing the jury that common carriers of passengers were "liable for the smallest neglect of their drivers," without qualification.

The court erred, too, in instructing the jury that the driver must be "familiar with the road from having made numerous trips over it, both in the daytime and night"; and in charging them further that it was immaterial to inquire whether plaintiff rode on the outside or inside of the coach. The burden rested on plaintiff not only to prove the injury, but that it occurred without his fault, and the court's instructions on this point were erroneous and tended to mislead the jury. See 1 Greenl. Ev. 48; 6 Cush. 364; 5 id. 305; 3 Gray, 463; 13 Pick. 69-76; Addison on Torts, 580 *et seq.*

It was error to allow evidence of the overturning of coach by this driver on other occasions. 60 N. Y. 279; 44 id. 465; 45 Barb. 299; 18 N. Y. 408; 115 Mass. 240; 118 id. 420.

The court's instructions based on such evidence were also erroneous; also the instruction that it was the driver's duty to inform a passenger when approaching a dangerous place; also as to whether this driver was intoxicated at other times when his coach was turned over.

The court erred in instructing the jury as to the matter of the plaintiff furnishing the driver intoxicants; in allowing them to inquire how much of the intoxication was caused by the liquors furnished by the plaintiff. Such requirements are impracticable, misleading and impossible.

The court is referred to the following additional authorities: 2 McLean, 159, 164, 169; 17 N. Y. 131; 50 Barb. 39; 18 U. S. Dig. 101; 20 id. 135, § 89; Story on Bailm. 561, 591; Bacon's Abr., note *c*, p. 125; *McCully v. Clark*, 40 Penn. 399; Whart. on Neg. 421-424; 101 Mass. 455-466; 20 N. Y. 65; 8 Allen, 227; 14 id. 429; 54 N. Y. 468; 105 Mass. 77, 403; 46 Mo. 456; 53 id. 366; Central Law Journal, Oct. 1 1875; Chicago Legal News, Nov. 11, 1876; Aug. 4, 1877; Albany Law Journal, Dec. 2, 1876, p. 380; 37 Ill. 384.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for respondent.

1. The objection of appellants that the trial of this case in the court below was a nullity, because held at an adjourned term of the court, rests solely upon California decisions under a special statute, and are inapplicable elsewhere.

The general rule of law is stated by Chief Justice MARSHALL in the case of "*The Mechanics' Bank of Alexandria v. Withers*, 6 Wheat. 106 (5 Curtis, 24). This is the rule wherever not limited by statute. *Sawyer v. Bryson*, 10 Kans. 199; *Casily v. State*, 32 Ind. 69; *Springbrook v. Road*, 64 Penn. 451; *Smith v. Smith*, 17 Ind. 75; *Conrad v. Johnson*, 20 Ind. 421; *Commonwealth v. Justices of Court of Sessions*, 5 Mass. 435; *People v. Northrup*, 50 Barb. 147; *Horton & Haile v. Miller*, 38 Penn. 270.

2. It is not necessary for complaint to aver that the accident complained of occurred without fault or negligence on part of plaintiff. It is for the defense to prove such fact if true. Authorities cited by appellants do not sustain their position. For sufficiency of complaint, see Abbott's Forms, vol. 1, No. 506 *et seq.*, p. 414 and notes; *Ware v. Gay*, 11 Pick. 110-111; *Richards v. Westcott*, 2 Bosw. 589; *Wolf v. Supervisors of Richmond Co.*, 19 How. Pr. 371.

3. The averments of complaint were sufficient to admit evidence of any specific fact which would constitute negligence about their servants, and the equipment and management of the coach on this particular trip. *Ware v. Gay*, 11 Pick. 106; *The Ind., Pittsburg & Cleveland R. R. Co. v. Taffe*, 11 Ind. 458; *Same v. Keeley's Admr.*, 23 id. 133; *Eldridge v. The Long Island R. R. Co.*, 1 Sandf. 89; *Oldfield, Admr., v. N. Y. & Har. R. R. Co.*, 14 N. Y.

The English authorities are still more uniform in the same direction.

4. It was not error in the court below in striking out that portion of appellants' answer, which set up that respondent was a trespasser on the coach, nor in the rulings of the court in excluding testimony thereon. Whart. on Neg., § 354 *et seq.*, and authorities cited. See, also, *Chi., Col. & Ind. Cent. R. R. Co. v.*

*Powell*, 40 Ind. 37; *Phil. & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 483; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; *Nolton v. Western R. R. Co.*, 15 N. Y. 444; *Norris v. Litchfield*, 35 N. H. 271; *Robinson v. Cone*, 22 Vt. 213; *Trow v. R. R. Co.*, 24 id. 487; Hilliard on Torts (2d ed.), 160; *Daley v. Norwich & Wor. R. R. Co.*, 26 Conn. 591; *Isbell v. N. Y. & N. H. R. R. Co.*, 27 id. 398; *Brown v. Lyon*, 31 Penn. 510; *C. C. & C. R. R. v. Terry*, 8 Ohio, 570; Redf. on Law of Carriers, 274 and notes; *Brewster v. Forrester*, 11 East, 160.

The same law applies to stage coaches as to railroads. See Angell on Carriers, § 538.

5. There was no error in refusing appellants to cross-examine witness Piatt, on matters not brought out in direct examination. Matters of defense belonged to appellants' case.

6. There was no error in refusing the instruction asked by appellants. All that was in law applicable was substantially given. *Com. v. Costley*, 118 Mass. 25, and authorities cited; 30 Cal. 448.

7. It was not error to instruct the jury that the driver must be familiar with the road. 3 Bing. 321, cited in 2 Chitty's Pl. 361, and note *k*. Story on Bailm., §§ 592-3, indorses the above decision of Chief Justice BEST. In *Ryan v. Gilmer et al.*, 2 Mont. 517, Justice BLAKE cites and approves *Ingalls v. Bills*, 9 Metc. 1, as to care and diligence required. See, also, *Fairchild v. Cal. Stage Co.*, 13 Cal. 605. See, further, Shearm. & Redf. on Neg., § 266, and cases cited in *Ryan v. Gilmer et al.*, 2 Mont. 517.

8. As to burden of proof, and negligence being presumed from the overturning of the coach, the following authorities are cited: 2 Mont. 517; 13 Cal. 605; *Mauvy v. Talmadge*, 2 McLean, 161-6; *Stokes v. Saltonstall*, 13 Peters, 190; *Boyce v. Cal. Stage Co.*, 25 Cal. 467; *Curtis v. R. & S. R. R. Co.*, 18 N. Y. 542; 21 Conn. 245; Shearm. & Redf. on Neg. 329-30; Whart. on Neg., §§ 627 and 661, and notes; 109 Mass. 398.

9. On the matter of contributory negligence, appellants had no ground to complain of the rulings or instructions of the court. 18 Cal. 351-357; 24 Barb. 276; 37 Cal. 409; Shearm. & Redf. on Neg., §§ 32-37; Whart. on Neg., § 301 *et seq.*

10. The court below did not err in admitting testimony as to this driver having overturned the coach before on same evening as well as when driving on other roads, under the limitations made by the court. Whart. on Ev., §§ 41-3, and authorities cited; *G. T. R. R. Co. v. Richardson et al.*, 1 Otto, 470; 42 Vt. 456, and cases cited; 14 N. Y. 218, and cases cited.

11. As to skill in assorted liquors and their varied and combined effects, much is conceded to the superior information and experience of appellants. The record sufficiently informs the court whether any error of ruling occurred to be matter of complaint.

KNOWLES, J. The appellants are common carriers of passengers. The respondent was injured by the upsetting of one of appellant's coaches upon which he was riding, and this action has been brought to recover damages for such injury. The legal propositions presented in the case will be considered in the order in which they are introduced by the briefs of counsel.

The judgment in this cause was rendered at an adjourned term of the court for Lewis and Clarke counties. During the interval of adjournment a term of court in the same district in which Lewis and Clarke counties are situated, by the same judge, was held at Diamond City in Meagher county. It is urged that the term of court for Lewis and Clarke counties terminated when the one in Meagher county commenced, and hence, that the judgment in this case was not rendered at a term of court, having been rendered at the adjourned term, and is therefore void. In support of this proposition a number of cases are cited from the decisions of the supreme court of California. These decisions rest upon a statute of that State which provides that a term of court shall in any county continue, if the business is not before finished until the commencement of the next term in some other county in the same district. These decisions hold that the terms of the statute fix the duration of the terms of the district courts for the several counties of the State. We have no such statute or order fixing the terms of the district courts for this Territory. These decisions therefore are not in point, and we must consider

this question upon the basis of the general powers of a court to adjourn from time to time. In the case of the *Mechanics' Bank of Alexandria v. Withers*, 5 Curtis' U. S. Sup. Ct. 24, Chief Justice MARSHALL held, that there being nothing in the act of congress to prevent, a district court of the District of Columbia had the power common to all courts, of adjourning to a distant day, and he held that such court had the power to adjourn from the 16th day of May to the fourth Monday in June. The fact that another term of court was held in the same district is the only one that makes this case different from the above. But how should that fact make any material difference? What considerations of public policy or rights of the citizen are incompatible with or are prejudiced by the exercise of this power to adjourn from time to time, even if it is carried so far as to allow an adjournment in one county to be extended beyond the term of court in another county. Rather, would not the objects sought by the establishment of courts in the Territory be effectuated by such a power? The terms of court held in one county are distinct from those held in another county, even in the same district. When a term of the district court is adjourned in one county it is not an adjournment of that court to another county. When the term is finished and adjourned *sine die*, that term is ended. When the court convenes in another county it does so for the purpose of holding a distinct term of court there.

No argument has been presented by the learned counsel in this case, and none has occurred to this court that will show any good and substantial reason for holding that under the laws of this Territory, and the orders of this court, the power to adjourn from time to time a court in one county should be limited to the time of the meeting of another term of court in another county in the same district. This assignment of error has no validity.

The complaint does not show that the injury was occasioned without any want of due care on the part of the respondent. Many courts of very high standing and great weight have held that such an allegation as this should be set forth by a plaintiff in his cause of action. The supreme court of the United States, however, has taken a different position. In the case of *The*

*Railroad Company v. Gladwin*, 15 Wall. 401, Justice HUNT says:

“While it is true that in the absence of reasonable care and caution on the part of one seeking to recover for any injury so received will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of such care or contributing negligence, as it is termed, is a defense to be proved on the other side. The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out.”

This court is bound by this decision. If the respondent was not required to prove that he exercised due care or caution, or was not guilty of any contributing negligence, he was not required to allege it in his complaint.

I come now to consider the most important and vital point in this case. The appellants, in answer to respondent's complaint, made the following denial and allegations, which upon motion were stricken out by the court and duly excepted to by appellants, viz.:

“That the said Higley was received as a passenger on their said coach as in the said complaint is alleged, but say that from the city of Jefferson to the said town of Helena, the said plaintiff was wrongfully thereon and contrary to the request and command of these defendants by their agents, who then and there having been refused, upon his request therefor, the fare of the said Higley on said coach, did not consent or agree to his becoming a passenger of defendants thereon, but forbade him so to continue thereon and did not consent thereto.”

Upon the trial the appellant offered to prove the above facts, and in addition thereto that the respondent declared in effect his intention to resist an expulsion from the coach with force. The reasons that induced the court below to make the above ruling are presented to us in his written opinion. He held that it made no difference as to whether the respondent had paid his fare when requested or not; as to whether or not he was on the coach with the express consent of the appellants. That if they did not expel him from their coach, and if necessary use sufficient force to

accomplish this, that in effect respondent was a passenger which appellants undertook to carry, and entitled to the same care as any other passenger on their conveyance.

There has been but one authority cited that in my opinion fully supports this doctrine. Whart. on Neg., § 354. As far as my investigations have proceeded I have been unable to find another authority that fully supports this view. That author evidently attempts to support this doctrine, as will be seen by a note to the above paragraph, by the rule that one trespass will not justify another. A carrier of passengers cannot be said to be guilty of a trespass until he has violated some duty or been guilty of negligence. This is undoubtedly a correct rule but does not meet a case like this. Can it be said that because the appellants did not expel respondent from their coach by force, that therefore they consented to his becoming a passenger thereon? A person who enters into the coach of a common carrier of passengers without any lawful right, or remains there after he has no lawful right to remain, and has been ordered to leave the same, certainly ought to be considered a trespasser as much as any one would be who enters the house of another unlawfully, or who remains there after he has been ordered by the proprietor to leave. Would any court hold that where a party had made a forcible entry upon the property of another, that because the owner thereof had not expelled him by force, therefore he had licensed or consented to his entry? Could any one hold, in case half a dozen highwaymen should enter the coach of appellants, remote from the settlements, without the consent of any agents thereof, and against the protest of their agents, and compel the driver to haul them fifty miles along the road, and neither the driver, nor any agents of the company, thought it even prudent to attempt to expel them from the coach, that therefore appellants consented to their occupancy of the coach and that thereby they became passengers? A person who enters the coach of a common carrier of passengers without any intention to pay his fare if the same is demanded, or who refuses to pay the same when it is demanded, is not lawfully in the coach. Any intermeddling with the personal property of another without his consent, express or implied, is a trespass. *Gilbert v Nagle*, 118 Mass. 278.

Who is a passenger? "A passenger is a person who undertakes with consent of the carrier to travel in the conveyance provided by the latter, otherwise than in the service of the carrier as such. Any fact indicating on the one side an offer to carry, or to be carried, and on the other side an acceptance of such offer or request are sufficient. \* \* \* The question whether one is a passenger or not is one of mixed law and fact, but the law being tolerably clear, it may be said as a general rule that the issue upon any conflict of evidence is one for a jury to decide and not one to be passed upon as a matter of law, by the court. *Shearm. & Redf. on Neg.* 305-6, § 262.

"While it is the duty of a common carrier of passengers to carry any person who may apply for passage, if he be a suitable person and the carrier has sufficient room in his conveyance, it is nevertheless true that this obligation is subject to the qualification that the regular fare be paid or tendered." *Angell on Carriers* (Lathrop's ed.), 437, § 525.

Before a person can become a passenger, he must offer to become one, and this offer must be accepted by the carrier, and unless the fare is waived it must be paid or tendered.

Many cases treat the relation of carrier and passenger as formed by contract. Now if a person proposes to become a passenger and yet refuses to pay his fare, whereupon the carrier refuses to undertake to carry him, how can there be said to be a contract of carriage between them? There is no mutuality in such a contract. The minds of the parties do not meet. Again, consider that the duties of a carrier are fixed by law and not by contract, then these duties are not required to be performed, without the person who demands their fulfillment pays his fare or tenders to pay the same or the payment is waived. Until that requirement is complied with, the carrier does not undertake to perform the duty of carrying him. Many cases might be cited to show that when a person enters into the conveyance of a common carrier of passengers, and if it is demanded, refuses to pay the regular fare, he can be expelled therefrom by force. These cases are based upon the view that such a person has no right in the conveyance of such carrier; that in fact he is a trespasser there. If a person with

great assurance enters a railroad car and takes the best seat therein and refuses to pay his fare when demanded, is he any less a trespasser than some poor, timid boy who gets upon a train and hides under the seats or in some nook in a baggage-car, without any intention of paying any fare? If so, I am unable to perceive it.

If the person I have named, upon the refusal to pay his fare, should be ordered to leave the car and given due opportunity therefor, but should refuse flatly to go, and the conductor should not deem it prudent to attempt to expel him on account of his known strength and fierce passions, I should think it would tax to its utmost the ingenuity of even so learned and competent an author as Mr. Wharton to find that the railroad company had consented to his becoming a passenger on their conveyance.

The appellants should have been allowed to prove that respondent was not a passenger, but a trespasser, unless the fact that he was not a passenger, but a trespasser, would not vary the liability of appellants.

I am confident that the authorities will support me in holding that if a person is not a passenger, a carrier of passengers does not owe him that high degree of care that he would to a passenger. The law imposes that high degree of care upon a carrier of passengers, from the fact that he carries passengers for hire as a business.

In the case of *Lucas, Admr. v. Taunton & New Bedford R. R. Co.*, 6 Gray, 64, the court held that a person who entered a railroad car to assist to a seat an aged and infirm aunt was not a passenger, and the railroad company was not bound to exercise toward her the extraordinary care due a passenger, but only ordinary care, a very different responsibility. In the case of *Lygo v. Newbold*, 9 Exch. 302, the plaintiff rode in the cart of defendant, without defendant's authority, by permission of defendant's servant, with the goods he had contracted to carry for her. The cart, being insecure, broke down, and plaintiff was injured. The court held that the defendant was not liable for the injury, the plaintiff not being rightfully in that cart.

"Railway companies owe a higher degree of watchfulness and care to those sustaining the relation of passengers than to mere

strangers having no fiduciary relations with the company. In the former case the utmost care and skill is required to avoid injuries, but in the latter case, only such as skillful, prudent and discreet persons, having the management of such business in such a neighborhood, would naturally be expected to put forth. Redf. on Carriers and other Bailees, §§ 520-1. This rule was approved in the case of *The State of Maryland v. Baltimore & Ohio R. R.*, 24 Md. 84. The above author in his work on Carriers and other Bailees, § 383, in commenting on the case of *St. Joseph R. R. Co. v. Hattie Higgins*, 36 Mo. 418, says: "One who had been in the employ of the company as an engineer and brakeman until his train was discontinued a few days previously, and who had not been settled with or discharged, although not actually under pay at the time, and who signaled the train to take him up, and who took his seat in the baggage car with the other employees of the company and paid no fare, and was not expected to, although at the time in pursuit of other employment, cannot be considered a passenger. If he would secure the immunities and rights of a passenger, he should have paid his fare and taken his seat in the passenger car." Again in a note, page 388 of the above work, he says, in speaking of a person traveling on a railroad, as though he was an employee thereof: "And if he claims the privilege and it is acceded to by the officers of the company, there is great injustice in allowing the person at the same time to hold the company to the higher responsibility which it owes to passengers from whom it derives a revenue." There is another class of cases which illustrates the rule I contend for, viz., cases where a person takes a position on a train where he has no right to be. In the case in 22 Barb. 91, it was held that where a person insisted upon riding with the engineer upon the engine without paying any fare, and is informed that this is against the rules of the company, and was injured, it was held that the company was not liable because plaintiff was a wrong-doer. In the case of *The Galena & Chicago Union R. R. v. Yarwood*, 15 Ill. 468, a person was received as a passenger in the baggage car but did not remain there, but went into another car, where an accident occurred and he was

hurt. It was held that the company was not liable, evidently upon the ground that the passenger had no right in the other car.

Another class of cases may be cited also, to show that the care a common carrier owes to passengers is greater than to those not passengers. When a common carrier strikes and injures a person in the street or upon a crossing of a street or upon a railroad track, he is liable for only ordinary care. *The C. C. & C. R. R. Co. v. Jacob Terry*, 8 Ohio, 570; *Bland v. The Schenectady and Troy R. R. Co.*, 8 Barb. 368; *Evansville & Crawfordsville R. R. Co. v. Hyatt*, 17 Ind. 102. A case reported in the Chicago Legal News of Aug. 4, 1877, announces a principle that meets this case. It is the case of *The T. W. & W. R. R. Co. v. Harvey Beggs*, and the opinion is delivered by BREESE, J., one of the most learned of the supreme court judges of the State of Illinois. He held as follows :

“Where one is riding on a free pass, not transferable, issued to another person, and is injured, he is not to be regarded as a passenger in the true sense of that term, and the company can only be held liable for such gross negligence as amounts to willful injury.”

The authorities cited by respondent, save Wharton on Negligence, do not support his view. The case of *The Columbus, Chicago & Indiana C. R. R. Co. v. Powell, Adm'r*, 40 Ind. 37, cannot be considered a strong case for respondent. The court held that the defendant in that case was a passenger and not a trespasser, upon the ground that the company could have collected fare of him. There was no demand for fare and no refusal to pay. But that court was not fully satisfied with its conclusion that defendant was a passenger, but said that if they were mistaken on that point the railroad company was under obligation to use some diligence and care in putting the defendant off the train. In this case an old and infirm man had by mistake got upon a wrong train and when he found out his mistake asked to be put off the train and told the conductor of his infirmities. The facts show that the jury would have been warranted in finding that the railroad company had not exercised ordinary care in putting him off

the train, and ordinary care is not the care required of passenger carriers toward passengers.

The case of *The Phil. & Reading R. R. Co. v. Derby*, 14 How. (U. S.) 483, was one where there was no doubt but the railroad company had undertaken to carry Derby as a passenger, but they sought to avoid liability from the fact that he had not paid any fare. Derby was rightfully upon the car, and yet the railroad company was held in that case only for gross negligence because of the non-payment of fare. That was the ground upon which the plaintiff was held liable in the court below, and the judgment was affirmed in the supreme court. To support his decision, Justice GRIER refers to the case of *Coggs v. Bernard*, 1 Smith's Leading Cases (Howard and Wallace's Notes), 346. In this case it was held that a gratuitous carrier of goods was liable for neglect. If there had been a consideration for the carriage, the carrier would have been liable as an insurer. It is evident, therefore, in that case, that Justice GRIER did not decide that a passenger carried gratuitously was entitled to the same care as a passenger for hire, although he thought that any thing that amounted to negligence might be called gross negligence under the circumstances. The case of *Ellen Wilton v. Middlesex R. R. Co.*, 107 Mass. 108, was one in which the court especially held that the plaintiff was not a trespasser, but was rightfully on the car, and the facts certainly warranted such a finding. It is intimated in this case, however, that if the plaintiff had been unlawfully on the car, or there had been any collusion between her and the driver to defraud the company out of the fare, she would not be entitled to recover.

In the case of *Nolton v. Western R. R. Corporation*, 15 N. Y. 444, the court found that the railroad company had undertaken to carry Nolton, although he paid no fare, and the facts show conclusively that he was rightfully upon defendant's cars. I think whatever may be said about this case, one thing is certain, and that is, that the court did not hold, in deciding it, that the defendant, as a common carrier, was liable for that high degree of care due a passenger for hire. In this case Justice SELDEN says: "The duty arises in such cases, I apprehend, entirely independ-

ent of any contract express or implied. The principle upon which any party is held responsible for its violation does not differ essentially in its nature from that which imposes a liability upon the owner of a dangerous animal, who carelessly suffers such animal to run at large, by means of which another sustains injury." And further on in the same opinion he says, the basis of the liability is, "culpable negligence of the party." This is not the basis of the liability of a common carrier of passengers. Hill, on Torts, 160, is authority for the rule that one trespass will not justify another, but it is no authority for the proposition that a common carrier owes the same degree of care to a trespasser as he does to a passenger for hire. The case of *Daley v. Norwich & Western R. R. Co.*, 26 Conn. 591, is not in point to prove that a carrier is bound to observe the same degree of care toward a trespasser as toward a passenger, but the contrary is true, for in that case the carrier was held liable only for ordinary care.

The case of *Brown v. Lynn*, 31 Penn. 510, is a case which in no way touches the liability of a common carrier. It was a case where a trespass was committed upon a trespasser. It is no more in point than a case would be, where one man, resisting a trespass committed by another, uses more force than is necessary and thus becomes a trespasser himself.

I believe I have now considered the principal cases cited by respondent upon this point, and they certainly do not maintain the doctrine that a trespasser upon the coach of a common carrier is entitled to the same care, skill and prudence as a passenger for hire. If the respondent was a trespasser, appellants were bound not to willfully injure him, for that would be attempting to justify one trespass by another. If he were a trespasser, appellants would be bound probably to exercise toward him ordinary care and no more. The court therefore erred in striking out the portion of appellants' answer above referred to. They should have been allowed to prove that respondent was a trespasser upon their coach and not a passenger, for the reason that such fact lessened their obligation to him.

The appellants complain because the case was tried as though it were an action for a tort, rather than for one on contract, when

the suit was founded on contract. I am inclined to think that the complaint in this case does not set forth a contract and allege a breach thereof, but the action is founded upon a tort, the negligence of appellants. Pomeroy's Remedies and Remedial Rights, § 573, says that in an action for negligence under a proper pleading under the reformed system it is impossible to tell from the complaint whether the action is upon an implied contract or an action *ex delicto*. It follows from this that the proof in the main must be the same, for the proof must follow the allegations.

Undoubtedly, under the old practice this complaint would have been considered a "declaration on the case." There was no error in the manner in which the case was tried. The complaint sets forth facts sufficient to warrant proof that the driver was intoxicated. It is therein alleged that appellants "did not furnish and provide competent, careful and skillful servants and drivers." This was the substantial fact to be proved and could be established by showing that the driver of appellants was so blind or infirm or had some other infirmity that rendered him incompetent, or that he was intoxicated. A drunken driver cannot be said to be a competent and careful one. To have required the respondent to set forth in his complaint that the driver was intoxicated, would have been requiring him to plead evidence. The testimony of George Piatt was undoubtedly introduced by respondent to show that appellants had not provided suitable horses, and the court should have allowed the appellants to have shown on cross-examination that the team used was as good, well broken and safe as the accustomed stage team. But as this very evidence was afterward introduced by appellants in defense by the same witnesses, they were not damaged by this ruling, and the judgment could not be reversed for this error.

The court gave the jury as favorable instructions upon the effect it would have upon the plaintiff's right to recover if the driver was made drunk by intoxicating liquors furnished him by respondent, and the accident and injury was occasioned by reason of such intoxication, as appellants could ask. The court told the jury if this was the case then he could not recover. Taking all of the instructions together upon the subject of the intoxication

of the driver, and I think they state the law as favorably to appellants as this court could sustain; I cannot agree that in the present state of our civilization a court would be warranted in saying, the giving a driver intoxicating liquors to drink must be placed upon the same footing as the administration of chloroform. It is claimed that the court gave no substitute for the 22d instruction, asked by the appellants, to the effect that if the respondent was intoxicated, and but for this would not have been injured, he could not recover; and also that there was no instruction that presented the same law to the jury as was embodied in the 29th instruction asked by appellants and refused, to the effect that the driver was bound to rely upon his own judgment. I do not know whether a court ought to refer to such points in a brief, for it will appear upon a reading of the instructions given by the court, that these instructions were in effect given in as strong and explicit language as asked for by appellants. Upon the subject of the liability of carriers of passengers and the degree of care to be exercised by them, and when they are not liable on account of contributing negligence on the part of the person injured, the instructions are sufficient, although an isolated portion of the charge may be dissected from the body thereof that will not present a complete view of the law. The instructions must be taken together, and if so taken, and the law is stated correctly there is no error. There was no error in instructing the jury that the driver should be familiar with the road over which he drives. If a common carrier of passengers by coach is to be held to the highest degree of care, prudence and skill that a reasonable and skillful man can provide, then he ought to provide drivers who are acquainted with the road over which they may be called upon to drive on dark, stormy or foggy nights. As matters of fact there is greater liability to accident from the cause that a driver is not acquainted with the road over which he is called upon to drive, than from any other cause. Although under the authorities it seems it was improper to allow evidence to be introduced of the turning over of the coach of appellants by the driver at other times than the one when the injury occurred, for the purpose of showing negligence on the part of the driver at the time the

coach was turned over and respondent injured, yet I am of the opinion that this evidence was so carefully limited by the instructions of the court, that the jury could not have used it to establish that fact. They were told definitely and clearly that this evidence could not be used to show the negligence of the driver at the time the respondent was injured, but might be used to show the bad character of the road and the necessity for a good driver. As this necessity is upon the appellants, from the very nature of the business they follow, I do not think they could have been damaged by the evidence. The bringing out on cross-examination the fact that this driver had had coaches he was driving before turn over with him, and all of the circumstances connected with such accidents was proper, as the witness had testified in chief that this driver was a good and skillful one. Any thing that would show that he was not was proper on cross-examination. The turning over of coaches even in this mountainous country, where the roads are poor and dangerous, is not frequent when the driver is good and competent and appreciates the responsibilities of his position and has a just pride in his useful and often dangerous and most arduous avocation. If a driver is about to approach a dangerous piece of road he ought to notify the passengers of his coach thereof, if there is any probability that there may be an accident there. It is not material whether a passenger rides on the inside or on the outside of a coach on the seat provided there. The case is not similar to that of a person on the platform of the car. There is a seat for passengers on the outside of a coach, but none on the platform of a railroad car.

Upon the theory on which the court tried this cause the instructions given were pertinent to the issue presented, and proper, and covered the ground presented in this case fully and fairly. The case, however, was tried upon the theory that it made no difference as to whether the respondent was a passenger or a trespasser in regard to the liability of appellants. For this reason a portion of appellants' answer was stricken out, and this was error, and for this the judgment of the court below is reversed, and the order striking out a portion of appellants' answer and the cause remanded for a new trial.

*Judgment reversed.*

WADE, C. J., dissenting. It is evident from an inspection of the record that this case was tried upon the theory that as the defendants had the undoubted right and authority to put any person off their coach who refused to pay his fare, therefore, so long as they permitted such person to remain thereon, he was by their consent a passenger to all intents and purposes, and entitled to the same degree of care as any other passenger, and I am not yet convinced that this theory is incorrect.

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MAYNE ET AL., respondents, v. CREIGHTON ET AL., appellants.

The same questions in this case were raised and determined as in the case of *Higley v. Gilmer et al.* See *ante*, p. 90.

*Appeal from Third District, Lewis and Clarke County.*

THE cause was tried in the court below by WADE, C. J.

KNOWLES, J. In this case the only error assigned is that the judgment rendered therein is void, because not rendered in term time. A term of court was commenced in Lewis and Clarke county and adjourned to a distant day. During the interval of adjournment a term of court was held in the county of Meagher in the same judicial district. It is claimed that the term of court for Lewis and Clarke county terminated at the commencement of the term in Meagher county.

We have considered the point presented in this case in that of *Higley v. Gilmer et al.*, at the present term. It was therein held that a similar judgment was rendered in term time and valid.

*Judgment affirmed with costs.*

## SMITH, respondent, v. DAVIS, appellant.

**PLEADING — malicious prosecution — answer — instructions.** It is incumbent on the plaintiff to allege in his complaint and to prove on trial, "malice and want of reasonable or probable cause," for prosecution. Under a general denial, the defendant may show that he acted upon the advice of counsel learned in the law and upon a full presentation of the facts, and this would be an effectual defense. It is not error for the court below to strike out from the answer such matter when specially and insufficiently pleaded.

Instructions to the jury should be given in accordance with these essentials to a defense.

**DAMAGES.** In action for malicious prosecution it is competent to allege and prove special as well as ordinary damages.

*Appeal from First District, Jefferson County.*

THE cause was tried before BLAKE, J.

SHOBER & LOWRY, for appellants.

The court below erred in not striking from complaint irrelevant matter calculated to excite prejudice of the jury, and such portions as contained law, argument, hypothesis and evidence, as distinguished from fact. *Green v. Palmer*, 15 Cal. 414; *Coryell v. Cain*, 16 id. 567; *Willson v. Cleveland*, 30 id. 200.

The court below erred further in striking out portions of answer setting up special defense as bar. This was necessary to be plead specially to admit evidence thereof. 2 *Estee's Pl.* 672-3, §§ 66-68.

The special defense was sufficiently pleaded. *Berrer v. Southard*, 10 N. Y. 236; *Potter v. Seale*, 8 Cal. 218.

The answer should have been judged as a whole and may contain as many defenses as exist. *Cod. Sts.* 1872, p. 39, § 59; *Bell v. Brown*, 22 Cal. 671; *Sweet v. Tuttle*, 14 N. Y. 465.

If party acts under advice of counsel in making arrest he is not liable for malicious prosecution. *Stone v. Swift*, 4 Pick. 389.

The court erred in the instructions given and refused.

SAMPLE ORR, for respondent.

If complaint contains surplusage, defendant was not injured

thereby, and the court will not reverse a case for error that has not injured appellant. Cod. Sts. 1872, p. 42, § 79.

The court below did not err in striking out part of answer. It was in contradiction of the general denial. *Klink v. Cohen*, 13 Cal. 623; *Kuhland v. Sedgwick*, 17 id. 128.

A sworn answer should be consistent with itself. *Hensley v. Tartar*, 14 Cal. 508.

Testimony as to state of appellant's mind was properly rejected, as the answer contained no allegation to justify such evidence.

The instructions of the court gave the law, as it relates to malicious prosecution, correctly. *Bliss v. Wyman*, 7 Cal. 257; *Harkrader v. Moore*, 44 id. 144.

WADE, C. J. This is an action for malicious prosecution. The complaint contains the proper averments of malice and want of reasonable or probable cause, the arrest and imprisonment of the plaintiff at the instance of the defendant, and the discharge of the plaintiff upon a trial before the magistrate.

The first defense is a general denial, and as a separate and distinct defense, the answer alleges that previous to making the affidavit that caused the plaintiff's arrest, the defendant stated the facts as he had been informed, and verily believed them to exist, to one G. F. Cowan, Esq., acting attorney for the Territory in said cause, and that he was informed by such attorney that the facts were sufficient to cause the plaintiff to be placed under bonds to keep the peace toward the defendant; that thereupon the defendant made the affidavit that caused the arrest of the plaintiff, which he avers he did without malice, and because he believed it to be necessary to protect his life.

There was a motion to strike out this second defense, which was granted, and this action of the court is assigned as error.

It was necessary for the plaintiff, in order to maintain the action, to allege in his complaint, and to establish by the evidence upon the trial, malice and the want of reasonable or probable cause. This is the gist of the action. It gives life to the complaint. And the defendant might have controverted every allegation that it became necessary for the plaintiff to prove in order

to make out his case, under the general denial. It follows, therefore, that it was not necessary for the defendant to plead the absence of malice, or that he had reasonable or probable cause for his act in causing the arrest of the plaintiff, in order to establish his defense. The general denial was a sufficient answer, and under it all the matter contained in the second defense, might have been and was introduced in evidence upon the trial. And so, even if there had been error in striking out this defense the defendant could not have been injured thereby.

But if it had been proper to have set forth this defense in the answer, the same was insufficiently pleaded and contained no defense to the action. In an action of this kind, the defendant, to show probable cause and to negative malice, may give in evidence, that he proceeded in the case in good faith, upon the advice of counsel, learned in the law, given upon a full representation of the facts. 1 Hill. on Torts, 437. The allegations of this defense fail to meet these requirements in two material respects. They do not show even that G. F. Cowan is a lawyer, much less that he is a counselor, learned in the law. They do not state that the defendant gave to this acting attorney for the Territory a full representation of the facts. That both of these items of proof are material and necessary in the establishment of this defense does not admit of much question. It is well settled that the defendant must show that he communicated to counsel, learned in the law, all the facts bearing upon the guilt or innocence of the accused, which he knew, or by reasonable diligence could have ascertained. 1 Hill. on Torts, 437-8; *Ash v. Marlow*, 20 Ohio, 119; *Bliss v. Wyman*, 7 Cal. 257; *Potter v. Seale*, 8 id. 217; *Stone v. Swift*, 4 Pick. 389.

In the latter case the court says: "It appears that Swift acted upon the advice of counsel; if he did not withhold any information from his counsel with intent to procure an opinion that might operate to shelter and protect him against a suit, but on the contrary, if he, being doubtful of his legal rights, consulted counsel learned in the law, with a view to ascertain them, and afterward pursued the course pointed out by his legal adviser, he is not

liable to this action, notwithstanding his counsel may have been mistaken in the law."

In *Hall v. Suydam*, 6 Barb. 83, the court says: "If a party lays the facts of his case fully and fairly before counsel and acts in good faith upon the opinion given him by such counsel, however erroneous that opinion may be, it is sufficient evidence of probable cause and is a good defense to an action for a malicious arrest."

Many other authorities might be cited to the same effect, but these are deemed sufficient to point out the defect in the matter contained in the second defense and in the proof that might have been adduced thereunder, and to show that the same was properly stricken from the answer.

The instructions that were given to the jury were drawn in accordance with the view of the law as herein expressed, while those offered upon behalf of the defendant conform to the theory expressed in the second defense and authorized the jury to find that reasonable or probable cause might be based upon the advice of a man not a lawyer, formed upon a partial statement of the facts of the case.

There was no error either in giving or in refusing to give instructions to the jury.

In addition to the ordinary damages recoverable in such an action as this, it is competent and proper to allege and to establish by the proof, special damages, and the motion to strike from the complaint allegations of this character was properly overruled. The judgment is affirmed with costs.

*Judgment affirmed.*

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**TERRITORY, respondent, v. MAHAFFEY, appellant.**

CRIMINAL LAW — *evidence to prove sodomy — corroboration of an accomplice.* Upon the trial of A. indicted for committing the crime of sodomy with B. in Deer Lodge, on November 9, 1877, B. testified to the commission of the offense by A. with him on November 9, 1877, at Deer Lodge, and also on other days before this date. The officer who arrested A. testified that he informed him he had

been arrested on the complaint of B., and that A. then said it would be one of the most interesting cases ever in court, and that B. was a boy prostitute. A brother of B. testified that A. came to his house about a mile from Deer Lodge, on the afternoon of November 9, 1877, and wanted B. to go to Deer Lodge to get wages which A. owed him, and that B. went away with A. and did not return until the next day. The clerk of a hotel in Deer Lodge testified that A. and B. went to bed in a room which he showed them, November 9, 1877. A. testified in his defense that he paid B. what he owed him, November 9, 1877; that they slept together at the said hotel; that he paid for the bed, and that he had nothing to do with B. of a criminal nature. *Held*, that the testimony for the Territory was properly submitted to the jury to prove the offense. *Held*, also, that B. was an accomplice, and that his testimony was corroborated by other evidence tending to connect A. with the commission of the offense, or the circumstances thereof.

*Appeal from Second District, Deer Lodge County.*

THIS action was tried before KNOWLES, J.

J. C. ROBINSON, for appellant.

The court erred in permitting B. to testify to acts similar to that charged, committed prior to November 9, 1877, as they would constitute a separate crime. 3 Greenl. Ev., § 13; Roscoe's Crim. Ev., § 81; 1 Arch. Crim. Pr. 393 *et seq.*; Whart. Crim. Law, §§ 635, 647-650.

In this offense it is not necessary to prove any intent other than what the law infers from the act itself. Proof of other crimes than that on trial is confined to the cases where it is necessary to show a specific intent.

B., having consented to the offense, was an accomplice. The evidence of C., Smith and Hyde, did not, in the least, tend to corroborate B., as required by law. Crim. Pr. Act, § 316; *People v. Josselyn*, 39 Cal. 393; *People v. Ames*, id. 403; *People v. Melvane*, id. 614.

If evidence of a distinct offense is admitted, it could only be to show intent, and this should be under instructions limiting it to such purpose.

A. E. MAYHEW, district attorney, second district, for respondent.

The testimony of B. was properly admitted to show the guilty

intent of appellant. There is a distinction between this and other criminal cases. 3 Greenl. Ev., §§ 14-18.

Where there is testimony showing the commission of an offense, and that the party charged was the person who committed the crime, this is such a corroboration of an accomplice as will warrant a jury in finding defendant guilty. 1 Phil. Ev. 106-111; Roscoe's Crim. Ev. 120-124; 2 Stark. Ev., §§ 10-12; 1 Greenl. Ev., §§ 379-381.

BLAKE, J. The appellant has been convicted of the offense which is described in the statutes as "the infamous crime against nature either with man or beast." Cod. Sts. 277, § 47. The court below overruled the motion for a new trial, and we are required to review the testimony to determine the questions before us. The indictment alleges that the offense was committed "on or about the 9th day of November, A. D. 1877," at Deer Lodge, with B.\*

B., a boy fourteen years of age, testified that the appellant committed the offense with his consent, at the Scott House, in Deer Lodge, on the night of November 9, 1877. Against the objection of the appellant, the witness then testified that the appellant had, on various occasions, committed this offense with him at the appellant's ranch, about seven miles from Deer Lodge before said date; and that the appellant called him a boy prostitute and threatened to put him in the penitentiary.

Against the objection of the appellant, L. P. Smith, a deputy sheriff, testified that he arrested the appellant and did not tell him what offense he was charged with; that on the way to the jail, the appellant stated he did not see what C.\* wanted him arrested for; that witness said it was not C., but that he had been arrested on the complaint of B., and that he could judge what it was for; and that the appellant then said it would be one of the most interesting cases ever in court, and that B. was a boy prostitute.

C. testified that he was a brother of B.; that the appellant came to his house about a mile from Deer Lodge on the after-

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\*The name of the witness is omitted in this report.—B.

noon of November 9, 1877, and wanted B. to go to his ranch and work for him ; that he objected because he wanted B. to go to school ; that the appellant then wanted B. to go with him to Deer Lodge to get what the appellant owed him for work ; and that B. went away with the appellant and did not return until the next day.

Frank Hyde testified that he was a clerk at said Scott House, November 9, 1877, and that the appellant and B. went to bed there in a room which he showed them, about eight o'clock.

The appellant testified in his own behalf that he went to C.'s house to hire B., and that he got him to come to Deer Lodge to get his pay ; that, after paying him, they went to the Scott House and slept together, November 9, 1877 ; that they went to bed about eight o'clock, and that the appellant paid for the bed and had nothing to do with the boy as testified to by B.

The appellant contends that the court below erred in permitting B. to testify to the commission of the offense prior to November 9, 1877, on various occasions, on the ground that these acts constitute separate crimes, and that it was unnecessary to prove any intent except that which would be inferred by law from the act. In *Commonwealth v. Snow*, 111 Mass. 411, which was a case of the same character as that at bar, Smith, with whom Snow committed the offense, testified not only to the acts committed at the time charged in the indictment, but also to other acts of the same nature. In *Commonwealth v. Nichols*, 114 Mass. 285, the court held that, upon the trial of an indictment for adultery, evidence of other acts of adultery committed by the parties, near the time alleged, in another county of the State, is admissible to support the charge in the indictment. *Thayer v. Thayer*, 101 Mass. 111. "When an act of adultery is attempted to be shown as committed at a particular time, acts of improper familiarity with the same *particeps criminis* at an anterior time are admissible." 2 Bish. Crim. Pr., § 17, and cases there cited. These authorities aid us in arriving at a correct conclusion. The rights of the appellant were protected by the court, and the jury were instructed that the appellant could not be convicted unless they found from the evidence that he committed the offense in

Deer Lodge, on or about November 9, 1877. We think that the evidence was properly submitted to the jury.

The appellant claims that the jury were not instructed correctly on the weight of the evidence of B. The instruction of the court follows the statute, which is in these words :

“A conviction cannot be had on the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense or the circumstances thereof.” Crim. Pr. Act, § 316. Under another instruction, the jury would be compelled to find that B. was an accomplice, a fact which is conceded by counsel.

The last ground on which the appellant asks for a new trial is that the evidence of C., Smith and Hyde does not corroborate the testimony of the accomplice, B., within the meaning of the statute. Upon this subject the case of *Commonwealth v. Snow*, *supra*, is directly in point. No witness testified that he saw Smith in the building where Snow committed the offense. It appears from the testimony that an outside door was locked at a time when it was usually open ; that Smith heard a conversation between Snow and Mrs. Morse ; that Mrs. Morse testified to the same conversation but did not see Smith ; that Smith took poison afterward and that Snow on three occasions inquired of a physician if Smith had told why he took the poison ; and that Emerson testified that Snow, one week after the commission of the offense charged in the indictment, attempted to commit the same offense with him, and said it would not hurt him and that he had done it with other boys. The court held that this testimony regarding the condition of the outer door, the inquiries of the physician, and the conversation with Emerson furnished some corroboration to that of Smith, and that the jury were justified in finding Snow guilty. In the case at bar, the appellant, after failing in his attempt to hire B., induced him, for the ostensible purpose of paying his wages, to go to Deer Lodge, and remain at the hotel in the same bed during the night, when B. was only one mile from his home. The testimony of L. P. Smith may be treated as a corroboration of B. and an admission by the appellant. We think it must be governed by the same rule, which was applie<sup>d</sup>

to the evidence of Emerson in *Commonwealth v. Snow, supra*, concerning which Mr. Justice WELLS says: "Any confession or conduct of his (Snow) which has any tendency to show that he is guilty of this particular charge is admissible. The court must see that it may thus affect the defendant; it is then for the jury to determine whether it does so affect him in fact, and to what extent. To render a confession or declaration admissible for the consideration of the jury, it is not necessary that it should be minute or explicit in its reference to the subject-matter. It cannot be excluded because \* \* \* it is so general or indefinite as to be applicable to other occurrences than the one under investigation, as well as to that. \* \* \* But if it may refer to that which is on trial, its indefiniteness or remoteness affects its weight only and not its admissibility." The statement of the appellant to L. P. Smith that B. was a boy prostitute was applicable to the offense for the commission of which the appellant was on trial, and the jury were properly instructed respecting their duty in considering it. There is no error in the record.

The cases in the California reports, which are relied on by the appellant, relate to crimes that are not the same as that under investigation, and some of them have been decided under the statutes of the State. In *People v. Josselyn*, 39 Cal. 393, the court holds that where the only evidence is the testimony of the woman on whom the attempt to produce an abortion was made, it must be corroborated in some material facts which constitute a necessary element of the crime. But the 45th section of the act concerning crimes and punishments defines the offense of which Josselyn was accused, and provides that a physician shall not be convicted of this offense "by the testimony of such woman alone." Josselyn was a physician and the court held that "such woman" had not been corroborated on a vital point in the case.

The necessity of protecting physicians in discharging the duties of their profession caused the passage of this act, and the court enforced it.

In *People v. Ames*, 39 Cal. 403, Ames was convicted of the crime of robbery. In *People v. Melvane*, 39 Cal. 614, Melvane was convicted of the crime of burglary. These cases were deter-

mined by the interpretation of the 375th section of the Criminal Practice Act, which contains the following clause that is not found in the laws of this Territory: "And the corroboration shall not be sufficient if it merely show the commission of the offense or the circumstances thereof." The court held that "the corroborating evidence, *of itself*, and without the aid of the testimony of the accomplice, must tend in some degree to connect the defendant with the commission of the crime in order to justify a conviction." *People v. Melvane, supra*. The court below did not err in refusing to give the instructions requested by the appellant, that were based upon these decisions.

*Judgment affirmed.*

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SCHNEPEL, appellant, v. MELLEN, respondent.

**COMPUTATION OF TIME.** In cases arising under statute or notice given in accordance with statute, where the last day on which a required act can be performed falls on Sunday, the act may well be done on the following day.

**RATIFICATION.** The act of an unauthorized agent only becomes the act of the principal after ratification upon full knowledge, so far as the intervening rights of third persons are concerned.

**TOWN SITE ACT — *filing statement of claim — forfeiture.*** The Town Site Act of Montana provides for no forfeiture for failure to file statement of claim within the time limited in notice of entry by probate judge or corporate authorities; such statement may well be filed subsequently. The case is analogous to those arising under the U. S. Pre-emption Laws.

**TOWN SITE ACT — *possession and occupancy.*** Actual possession and occupancy required as preliminary to making statement of claim and proof thereunder must be open, notorious, apparent, unequivocal, uninterrupted and exclusive; carrying with it dominion of claimant as against all other persons, with evidence of ownership visible to all the world, and not be simply a temporary and partial occupancy of a bare trespasser.

**TOWN SITE ACT — *trust.*** The probate judge or corporate authorities under the Town Site Act of Montana are only the trustees of such as by occupancy and possession as above defined are entitled to make a valid statement of claim.

*Appeal from Second District, Deer Lodge County.*

**THE facts of the case are included in the opinion of the court.**

**J. C. ROBINSON, for appellant.**

The probate judge under the law is trustee for occupant alone. The trust is created by act of congress and must conform thereto. U. S. Rev. Sts., §§ 2387-2391.

The act of congress was not intended to deprive a *bona fide* occupant of his rights. *Ricks v. Reed*, 19 Cal. 566; *Jones v. Petaluma*, 38 id. 399; *Allemany v. Same*, id. 556; *LeRoy v. Cunningham*, 44 id. 602. The foregoing cases are under an act of congress similar to that of 1867, under which the probate judge was acting in present case and the authorities are in point as to who are the beneficiaries named. To same point see *Edwards v. Tracy*, 2 Mont. 50; Cod. Sts. of Mont. 547, § 1. Sections 6 and 8 of same statutes designate who are entitled to file prior to public sale. The right is confined to occupants, and respondent was not an occupant within the meaning of the law. He was only a trespasser on another's possession.

As to what constitutes possession see Cod. Sts. 516, § 7; *Le Roy v. Cunningham*, 44 Cal. 602; *Gray v. Collins*, 42 id. 156; *Brumagim v. Bradshaw*, 39 id. 24; Tyler on Ejectment, §§ 888-891, 899, 900, 904, 905. The affidavit in this is in due form but false in fact.

Appellant was entitled to file by reason of the value of his improvements and undisputed possession since 1868.

The filing of appellant was within the prescribed time, counting from the ratified act of L. W. O'Bannon. A party entitled to file has until the time unclaimed lots are advertised to be sold, to make such filing. See § 16, Town Site Act; Cod. Sts. Mont., 547; *Shaw v. Randall*, 15 Cal. 386; *Tuohy v. Chase*, 30 id. 527; *People v. Lake County*, 33 id. 487; Sedg. on Stat. Const. 368, 370, 376.

If statute does limit filing to sixty days, respondent was not in time, if he had any right to file at all. The time expired August 18, and not on August 20, as stated in notice; but if on the 20th as that was Sunday, it must have expired on Saturday, 19th, the day previous. *Bissell v. Bissell*, 11 Barb. 96; 1 Wend. 42; *Ex parte Dodge*, 7 Cow. 147; 17 N. Y. (3 Smith) 502. The provision on this subject in the Practice Act is confined thereto.

Either appellant had right to file, or the lot should have been treated as unclaimed, to be disposed of at public sale.

W. W. DIXON, for respondent.

1. The laws for disposal of town lots, both of the United States and of the Territory, are analogous to the pre-emption laws, and the same principles of construction should apply.

The claimant of land or lot must comply with the law in time and manner of filing or he loses his right.

The decision of the land department and courts agree that a party failing to file his claim within time required loses his rights if another claim intervenes. 1 Lester's Land Laws, 444; Copp's Pub. Land Laws, 289 *et seq.*, and 409; *Johnson v. Towsley*, 13 Wall. 72. Courts have no power to dispense with requirements of act of congress. *Megerle v. Ashe*, 23 Cal. 74; *Damrell v. Meyer*, 40 id. 166; *Poppe v. Athearn*, 42 id. 606; *Megerle v. Ashe*, 47 id. 632; *Carpenter v. Sargent*, 41 id. 557; *Borland v. Lewis*, 43 id. 569.

Claimant of town lot must file within time prescribed. *Cofield v. McClellan*, 1 Col. 372.

2. Respondent entered on lot in dispute August 21, 1876; did some work, and on same day filed statement in due form. See agreed statement of facts. These points cannot now be controverted. Whether it was a case of trespass is immaterial.

The case of *Edwards v. Tracy*, 2 Mont. 49, differs in this, that there was no occupation or possession.

Appellant lost his right to the lot by failing to file within required time, and respondent's claim intervened.

3. Requirement to file within time limited is mandatory and not directory, otherwise it amounts to nothing. See authorities cited above. The provision is analogous to mining laws requiring work to hold a claim; if work is not done the claim is forfeited, if third person takes advantage of it, though the law may not expressly say so. *King v. Edwards*, 1 Mont. 235.

4. Respondent filed August 21, 1876. It is agreed that the notice of the probate judge was sufficient, in due form, pursuant to and in accordance with law. Appellant claims his filing Aug. 21, and that it was within the time.

The rule of Civil Practice Act should apply in computing time and when the last day falls on Sunday, the day following is in time. 2 Pars. on Cont. 666 ; 6 Abb. N. Y. Dig. 139, § 132.

5. If neither appellant nor respondent filed in time, the claim of respondent is best, he having filed first. Cod. Sts. 550 ; Town Site Act, § 16.

6. Appellant's filing only dates from Aug. 22, when he ratified act of L. W. O'Bannon, and this was too late by any possible construction.

*Quere*, can agent without written authority make application contemplated by Town Site Act.

The act of ratification must occur at time and under circumstances when principal might have lawfully done the act ratified. 1 Pars. on Cont. 45, note and authorities cited ; 2 Kent, 450, note ; Story on Agency, §§ 244-6.

The law will not admit the ratification of agent's acts to defeat intervening rights of third party. *Stoddard v. U. S.*, 5 Abb. N. Y. Dig. 391, § 9 ; *Taylor v. Robinson*, 14 Cal. 396 ; *McCracken v. San Francisco*, 16 id. 624. And see *Cook v. Tullis*, 18 Wall. 332.

Respondent is entitled to the lot by compliance with the law. Appellant lost his rights by his own laches for which no excuse is offered, and therefore judgment of the court below should be affirmed.

WADE, C. J. This action was instituted to quiet the title to a certain lot in the town of Philipsburg, in the county of Deer Lodge, and was submitted to the court and determined upon the following agreed statements of facts.

1. That the plaintiff and defendant are now and were at the times hereinafter mentioned citizens of the United States, over twenty-one years of age, and residents and inhabitants of the town of Philipsburg in Deer Lodge county, Montana Territory.

2. That at the times hereinafter mentioned, O. B. O'Bannon was and now is the duly qualified and acting probate judge of said Deer Lodge county, Montana Territory.

3. That about the first day of June, A. D. 1876, the land on which the town of Philipsburg, Deer Lodge county, Montana Territory is situated (then being on public lands of the United States, and said town of Philipsburg being then and now not an incorporated town), was duly and regularly entered in the United States Land Office at Helena, Montana Territory, by said O. B. O'Bannon, probate judge of said county of Deer Lodge, under and by virtue of the act of congress of the United States relating to town sites on public lands, approved March 2d, 1867, and entitled: "An act for the relief of the inhabitants of cities and towns upon the public lands," and the acts of congress amendatory to said act or relating to said matter of town sites, and said entry was duly allowed, as entry of the town site of said town of Philipsburg, and afterward a patent therefor from the United States to said probate judge was duly issued.

4. That lot No. three (3) in block No. seven (7) in controversy in this case is within and included in said town site of said town of Philipsburg, entered as above mentioned, and is one of the regularly laid off and surveyed town lots thereof.

5. That after the entry of said town site as above mentioned, the said O. B. O'Bannon, probate judge as aforesaid, in pursuance of, and in accordance with, section five (5) of chapter fifty-eight (58) of the Codified Laws of Montana Territory, approved January 12, 1872, on page 548 thereof, in the law relating to town sites, gave, posted and published due notice as required by said section 5, of said entry of said town site, and requiring any claimant of any town lot or lots in the town of Philipsburg to file in the office of the probate judge of the county a statement of his or their claims on or before the 20th day of August, 1876; that the first publication and posting of said notice was on the 19th day of June, 1876; that said notice was given in the manner and for the length of time required by law, and was in accordance therewith; and that the 20th day of August, 1876, was a Sunday.

6. That the lot in controversy in this case has been actually possessed by the plaintiff herein since the year 1868, and that he had on said lot, improvements to the value of about \$600, and that plaintiff's right and possession were not disputed by de-

fendant herein, prior to the 21st day of August, 1876, nor did the defendant claim the lot before that time.

7. That on the 21st day of August, 1876, and before any application to enter the lot in dispute had been made, or any statement of claim thereto had been filed by any one, the defendant made application to the probate judge to enter said lot, and immediately thereafter entered upon said lot in dispute, and dug some post holes thereon, and afterward on the same day, to wit, on the 21st day of August, 1876, did make and file with the probate judge, in due form of law, his application to enter, and statement of claim to said lot, which was duly received and filed by the probate judge, and the lawful fees therefor paid by the defendant, and that the proceedings above mentioned were the first claim or right made by the defendant to said lot.

8. That on said 21st day of August, 1876, and between the time when the defendant made application to enter said lot and the time when he filed his statement of claim thereto, as above mentioned, one L. W. O'Bannon, assuming to act as agent of and for and on behalf of plaintiff herein, and in plaintiff's name, filed with the probate judge the application to enter and statement of claim of the plaintiff to the lot in dispute, which was in due form, and was duly received and filed by the probate judge, and the fees therefor duly paid to the probate judge.

9. That at the time of making this application, and filing the statement of plaintiff's claim to the lot by said L. W. O'Bannon, as above recited, he had been in no manner authorized or empowered by the plaintiff to make said application, or to file said statement of claim, but that O'Bannon, in so doing, acted on his own motion and without the authority or knowledge of plaintiff, and that O'Bannon so stated to the probate judge.

10. That on the 22d day of August, 1876 (being the next day after the filing of said O'Bannon and defendant on said lot), plaintiff was for the first time informed by said L. W. O'Bannon, of what said O'Bannon, assuming to act as agent for plaintiff, had done the day previously as to filing statement of claim to the lot in dispute, and plaintiff thereupon, on said 22d day of August, 1876, approved and ratified the acts of said O'Bannon.

11. That the contest between the parties as to said lot was afterward heard before the probate judge, who awarded the lot to the defendant.

There was an appeal to the district court, where the action of the probate judge was affirmed, and a judgment and decree entered in favor of defendant, giving him the ownership and possession of the lot in question. From this judgment and decree the plaintiff appeals to this court.

The law of congress in relation to town sites on the public domain, referred to in the statement of facts, is found in the Rev. Sts. of the U. S., p. 439, § 2387, and is as follows :

“Whenever any portion of the public lands have been or may be settled upon and occupied as a town site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town site be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests ; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.”

In pursuance of this act of congress and to give effect to the same, our legislature enacted a statute on the subject of town sites situate upon the public lands and providing the means whereby the inhabitants of such town sites might acquire title to the lands therein occupied and possessed by them. Cod. Sts. 547.

Section 1 of this act provides for the entry of the land occupied as a town, in the land office, by the corporate authorities of the town, or the probate judge of the county, in trust for the several use and benefit of the occupants of such land, according to their respective interests. Section 2 empowers the corporate authorities or the probate judge to perform the several acts and things necessary and appertaining to the entry of such

land in the proper land office. Section 3 provides for the survey of such town site which shall conform as near as may be to the existing rights and claims of the occupants. Section 4 designates what the plat and survey shall contain: as what blocks, streets and alleys. And section 5 is as follows:

“Immediately after such survey and plat has been filed, or if such survey and plat has been made previous to the entry, according to the provisions of section *three* of this act; then immediately after the entry of the lands at the proper land office, as provided in the first section of this act, the corporate authorities or the probate judge, as the case may be, shall cause a notice to be published in all the newspapers published in such town, or if no newspaper be published in such town, then by advertisement posted up in twelve of the most public places in such town for at least two months, giving notice of such entry, and requiring every claimant or claimants of any town lot or lots, to file in the office of such corporate authorities or probate judge, as the case may be, a statement of his or their claim, within two months from the date of the first publication of such notice.”

Section 6. “Such statement shall be made in writing, signed by the party or parties making the same, and verified by the affidavit of such party or parties, and shall be recorded at length in a well-bound book to be provided and kept for such purpose by such corporate authorities or probate judge, as the case may be. Such statement shall specify the ground of such claim, particularly describing the lot or lots claimed, the date, as near as may be, of the occupation of such lot or lots, and by whom; what improvements have been made on said lot or lots, and the value thereof; and that such lot or lots are now actually possessed and occupied by such claimant, or that the right to such occupation is in the claimant, if such lot or lots are occupied by another.” Then follow sections of the act providing for the proof of the matters contained in the statement of the claimant; the number of lots any one claimant may pre-empt under the act; for awarding deeds to the claimants by the corporate authorities or probate judge when the proof sufficiently establishes the claim; for hearing contested cases where there is a dispute as to the right to a deed, and for appeals to the district court.

Then follows section 16 in these words: "The residue of lots in the possession of the corporate authorities or probate judge as the case may be, and unclaimed after the expiration of sixty days, it shall be the duty of the probate judge or corporate authorities, as the case may be, to post up notices, or cause the same to be done, in at least four public places in the county in which such town site is located, at least ten days before sale, that he will offer and sell at public sale all of, or so many as he may think proper, of the lots that may remain unclaimed at the time advertised," etc.

1. The act of congress confides to the local legislatures the trust of enacting such laws as will carry into execution the purpose of the government as declared in the act, and afford the relief proposed, and no question is made as to the validity of our legislative enactment on the subject. The first question then arising under these statutes and the agreed statement of facts herein which we will consider is, as to when the time expired for a claimant to file his statement of claim to a lot under the notice as given, of the entry of the town site in the land office by the probate judge. The statute requires two months' notice of the entry. In this case the first publication was on the 19th of June, 1876, requiring claimants to file their statement of claim on or before the 20th day of August, 1876, which 20th day of August was Sunday. Did the time for filing such statement, under the notice, expire on Saturday, the 19th, or on Monday, the 21st of August? The general rule for the computation of time in cases of this description undoubtedly is that where the last day in which the required act can be performed falls on Sunday, the act may be well done on the following day. Sunday is excluded from the count. In the case of *Goewiler's Estate*, 3 Pen. & Watts, 200, the court say: "Without recurring to all the decisions on the subject of computation of time, it may be sufficient to say, that whenever by rule of court or an act of the legislature a given number of days are allowed to do an act, or it is said that an act may be done within a given number of days, the day in which the rule is taken or the decision made is excluded, and if one or more Sundays occur within the time, they are counted unless

the last day falls on Sunday, in which case the act may be done on the next day."

"When days of grace are allowed on a bill or note and the third day falls on Sunday, the bill or note is payable on the previous Saturday. The same custom of merchants, which as a general rule allows three days of grace to a debtor, has limited that indulgence to two days in those cases where the third is not a day for the transaction of business. But when there are no days of grace, and the time for payment or performance specified in the contract falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday. This question was very well considered in *Avery v. Steward*, 2 Comst. 69, which was an action on a note not negotiable, which fell due on Sunday, and the court held that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by GOULD, J., that Sunday cannot for the purpose of performing a contract be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time mentioned in a contract for the performing of an act, intervening Sundays are to be counted, but when the day of performance falls on Sunday, it is not to be taken into the computation. *Salter v. Burt*, 20 Wend. 204." "Where the rule to plead expires on Sunday, the defendant has the next day in which to plead. Where the last day is Sunday, that is to be rejected. *Cock v. Bunn*, 6 Johns. 325." See, also, *Campbell v. Int. Life Ins. Soc.*, 4 Bosw. 298; 2 Pars. on Cont. 666; *Hammond v. Am. Mut. Life Ins. Co.*, 10 Gray, 306.

We hold, therefore, that the statement of claim to the lot in question was, under the notice, in time, if made on Monday, the 21st day of August.

2. The claim of the defendant was filed with the probate judge on Monday, the 21st day of August. Subsequently and on the same day, O'Bannon, the unauthorized agent of the plaintiff, on his own motion and without the knowledge of plaintiff, filed a claim with the probate judge on behalf of the plaintiff, which act of O'Bannon was, on the 22d day of August, approved and ratified.

When did the act of O'Bannon become the act of plaintiff? Clearly not until plaintiff had after full knowledge ratified the act. One man can only be bound by the authorized acts of another or by the ratification of unauthorized acts. And such ratification must take place at such a time, when it would have been lawful for the party so ratifying the act to have performed the act himself. And if between the time of performance of the unauthorized act by the agent, and its ratification by the principal, the rights of third parties intervene, such rights are not defeated by the ratification. It follows, therefore, that the filing of plaintiff's statement of claim did not take place until the 22d day of August, which day was outside of and beyond the time mentioned in the notice.

3. What consequences follow this omission of the plaintiff to act within the time designated in the notice? The statute declares no forfeitures in consequence of the failure to file statement of claim within the time prescribed. Such failure authorizes and empowers the probate judge or corporate authorities, if they think proper, to advertise and sell the unclaimed lots. They can advertise and sell, or not, in their discretion; if they do not, then there is nothing in the act to forbid any one entitled, making and filing his statement of claim, after the expiration of the two months' notice of entry of the town site for a patent. If a lot is not claimed within the time prescribed, it becomes subject to claim by a third person as a vacant lot, but if the rights of no third persons intervene, we can see nothing in the statute to prevent a claimant, who was in the possession and occupancy of his lot at the time the notice was given, from making his claim after the expiration of such notice. The purpose of the act of congress and of the legislature was to secure to the *bona fide* occupant, that is to say to the *equitable* owner, a title to the lot in his possession. The title to the town site was conveyed by the government to the probate judge in trust for this sole purpose, and this trust should be performed in its letter and spirit, unless this equitable owner and occupant, by his neglect to do the act required, has thereby secured rights and equities to third persons that cannot be disturbed. In the absence of any such interven-

ing rights, and the statute nowhere forbidding it, and the purpose of the law being to secure to the equitable owner his title, we think such owner, under such circumstances, entitled to make and file his statement of claim, and to receive a deed to his lot after the expiration of the time named in the notice. A reference to the pre-emption laws of the United States, and their interpretation by the courts, warrants the conclusion to which we have arrived. Our Town Site Act, made in pursuance of the act of congress, is in fact a pre-emption law, and in many respects is analogous to the general pre-emption laws. Hence the interpretation of the general laws is authority for the construction to be put upon the act in question. Section 5 of the Pre-emption Act of 1843 (5 Sts. at Large, 620) provided that claimants under the late pre-emption law for land not yet proclaimed for sale, are required to make known their claim, in writing, to the register of the proper land office, *within three months from the time of settlement*, giving the designation of the tract and the time of settlement, *otherwise his claim to be forfeited*, and the tract awarded to the next settler in the order of time on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law. In the case of *Johnson v. Towsley*, 13 Wall. 72, it was argued that as Towsley had neither filed, nor offered to file, his declaratory statement within the three months from the time of his settlement upon the land, as required by section 5, his claim as a pre-emptor thereby became forfeited. It was further argued, that if, after having occupied the land nearly a year, he was at liberty to file a declaratory statement, asserting his settlement to have been within three months, then he could occupy the land indefinitely, and need never file his declaratory statement, and the law requiring him to do so within three months became nugatory. A similar arrangement was made in the case at bar, that if the claimant of a town lot was not required to make his statement of claim within the time provided in the notice, then the statute became inoperative, and the claimant might not only refuse to procure a title himself, but could prevent any other person from so doing. But, notwithstanding the

argument in the case cited, the court, by MILLER J., in deciding the question, used the following language:

“The record shows that his (Towsley’s) settlement commenced about eight months before he filed his declaration, and it must be conceded that the land was of that class which had not been proclaimed for sale, and his case must be governed by the provisions of that section. It declares that where the party fails to make the declaration within the three months his claim is to be forfeited, and the tract awarded to the next settler in order of time on the same tract who shall have given such notice and otherwise complied with the conditions of the law. The words, ‘shall have given such notice,’ presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. If no other party has made a settlement, or has given notice of such intention, *then no one has been injured by the delay beyond three months, and if, at any time after the three months, the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made.* And we think that congress intended to provide for the protection of the first settler, by giving him three months to make his declaration, and for all other settlers, by saying if this is not done within three months, any one else who has settled on it within that time, or any time before the first settler makes his declaration, shall have the better right. As Towsley’s settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section, under a sound construction of its meaning.”

This is the construction put upon the fifth section of the Pre-emption Act by the supreme court of the United States, notwithstanding the fact that the section declares a forfeiture in case the settler fails to file his declaratory statement within three months from the date of settlement. It will be seen by this decision that when there is no adverse claim, and no intervening

rights to be affected thereby, then there is no purpose accomplished by a forfeiture, and if not, the declaratory statement may be made at any time after the three months have expired. If the first settler neglects to file his declaratory statement as required, then the tract of land upon which he has settled shall be awarded to the next settler in order of time, on the same tract, but if there is no settler other than the first, then the failure to file the declaratory statement within the three months works no forfeiture, and in such a case it may be filed after the three months.

The declaratory statement in the pre-emption, and the statement of claim in the Town Site Act, have for their object the same purpose and mean the same thing. If the declaratory statement may be filed after the expiration of the three months, then the statement of claim may be filed after the two months' notice has expired. If the failure to make the declaratory statement works no forfeiture of the land, saving as to some person who has settled and filed upon the same tract, then the neglect to make the statement of claim to a town lot, within the two months, does not forfeit the claimant's right thereto, saving as to some other person who has complied with the law in making his claim to the same lot. Neither the Pre-emption Act, nor the Town Site Act, were intended as acts of forfeiture, but they were designed to secure to and protect each actual settler and occupant in the enjoyment of the property settled upon and possessed by him. And while continuing so to occupy and possess the lands settled upon in good faith, the claimant ought not to be disturbed in his rights by failing to take the necessary steps to acquire a title from the government, so long as such failure does not in any manner injure or affect the rights of any other person.

4. Had the rights of the defendant so attached to the lot in question by occupation and possession, that the plaintiff had lost his right to file his statement of claim, after the expiration of the two months' notice?

The agreed statement of facts shows that on the 22d day of August, 1876, the plaintiff ratified the act of O'Bannon in filing statement of claim to the lot, and that for eight years prior thereto the plaintiff had been in the peaceable possession and

occupation thereof, and had placed improvements thereon to the value of \$600. The statement further shows that while the plaintiff was so in possession and occupancy of the lot, on the 21st day of August, 1876, the defendant entered upon the lot and "dug some post holes thereon," and thereupon, on the same day, filed his statement of claim to the lot, and by reason of such act was afterward awarded the title thereto. The statement of facts shows that the sole right of the defendant to the lot rests upon the following facts: that while the plaintiff was in the possession and occupancy of the lot, and his improvements thereon, the defendant, upon the last day in which statement of claims by the terms of the notice could be filed, entered upon the lot and "dug some post holes," and thereupon immediately filed his statement of claim; and the further fact that the plaintiff failed to ratify the statement of claim made and filed in his behalf until the next day after the time for filing of claims had, by the notice, expired.

Having shown that the plaintiff had the right to make his claim to the lot after the expiration of the notice, provided the rights of no person were thereby infringed, the question now is, had the rights of the defendant so attached to the lot, and had he so far complied with the law as to justify his claim thereto, and to defeat the right of the plaintiff to make his claim after the expiration of the notice? By virtue of the defendant having "dug some post holes" on the lot, which at the time was in possession and occupancy of the plaintiff, did the probate judge thereby become the trustee of the defendant, as of a person in the possession and occupancy of the lot, whereby the trustee was required to make him a deed thereof? It appears, from the statement of facts, that the defendant, some time during the day or night of the 21st day of August, 1876, committed a trespass upon the property of plaintiff by "digging some post holes thereon," and then immediately hastened to the probate office and made his statement of claim. Do these acts of possession and occupancy on the part of defendant authorize him, under the law, to make and file a claim to the lot? It cannot be supposed that the act of congress or of the legislature intended to authorize a mere trespasser, having

neither of the qualifications of occupancy or possession, to steal a lot, and we are therefore remitted to a solution of the question as to what constitutes occupancy and possession under the Town Site Act and the act of congress. The act of congress declares that the probate judge shall hold the lots in trust for the several use and benefit of the occupants thereof, according to their respective interests, and the sixth section of the act of the legislature provides, when defining what the statement of claim shall contain, and consequently what proof the claimant shall make, as follows: "Such statement *shall specify the grounds of such claim*, particularly describing the lot or lots claimed, the date as near as may be of the occupation of said lot or lots and by whom; what improvements have been made on said lot or lots and the value thereof; *and that such lot or lots are now actually possessed and occupied by such claimant*, or that the right to such occupation is in the claimant, if such lot or lots are occupied by another." Section 7 of the act provides that the claimant shall within six months after the expiration of the notice, make proof of his claim, and of the facts contained in his statement.

According to the agreed statement of facts, the proofs that the claimant, the defendant, could submit under the seventh section would be the following: First, as to the nature of his claim, the proof would be that he had entered upon the lot of plaintiff, and "dug some post holes thereon," and immediately left the premises. Second, as to the date of his occupation, the proof would show that to have been some time during the 21st day of August, 1876, being the same day upon which he entered upon the lot and "dug some post holes." Third, as to the occupation, the proof would show that it had been in the quiet and undisputed occupation of the plaintiff for eight years next prior to the 21st day of August, 1876, and was so in his occupation on that day, unless the fact that sometime during that day the defendant entered upon and "dug some post holes thereon," transferred the occupation and possession from the plaintiff to the defendant. Fourth, as to the proof of improvements on the lot, by the defendant, and their value, reference would again be had to the "post holes," and the probable cost of digging the

same. And, Fifth, as to the proof of the fact that at the time of making his statement of claim, the defendant was in the actual possession and occupation of the lot, the testimony would show the entry [on the lot by the defendant and the digging of some "post holes thereon," and the immediate abandonment of the lot for the probate office.

The imperative requirement of the statute is that the proof shall show that the claimant, at the time of filing his statement of claim, was in the *actual occupation* and possession of the lot claimed. Upon such occupation and possession rests his right to the equitable ownership of the property, and only by virtue of these two elements of title, does the probate judge become the trustee of the claimant, with authority to make him a deed. No trust arises or is created unless an equitable ownership is shown, and the statute declares that such ownership shall be evidenced by actual occupation and possession.

What, for the purposes of this act, is the meaning of the words, "actual possession and occupation?" The supreme court of California has many times defined the meaning of these words, when used in acts similar to our Town Site Act. In the case of *Coryell v. Cain*, 16 Cal. 573, the court defined actual possession to be, "a subjection to the will and dominion of the claimant and it is usually evidenced by occupation, by a substantial inclosure, by cultivation or by appropriate use according to the particular locality and quality of the property." This authority defines actual possession, but our act requires not only actual possession but also *actual occupation*; and in the case of *Wolf v. Baldwin*, 19 Cal. 313, the court declares the meaning of these words, and says, in speaking of the "actual occupation" required under the Van Ness ordinance, that it was a "possession which is accompanied with the real and effectual enjoyment of the property. It is the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others; and this possession must be evidenced by occupation or cultivation, or other appropriate use according to the locality and character of the particular premises." \* \* \* "It must, in other words, be an open, unequivocal, actual possession; notorious, apparent,

uninterrupted and exclusive, carrying with it marks and evidence of ownership, which apply in ordinary cases to the possession of real property."

To the same effect is the case of *Le Roy v. Cunningham*, 44 Cal. 599, where the court construes the same words in a grant by congress of "Point San Jose Military Reservation," to the city of San Francisco, in trust for the occupants. See, also, *Gray v. Collins*, 42 Cal. 156; *Brumagim v. Bradshaw*, 39 id. 24; Tyler on Ejectment, 894 *et seq.*

It would, therefore, seem that actual occupation and possession of a town lot under our Town Site Act, in order to entitle the claimant to hold the same, must be such as is open, unequivocal and actual; it must be notorious, apparent, uninterrupted and exclusive. It must, in other words, be such an occupation and possession as openly asserts the right and dominion of the claimant over the property as against each and every other person. It must be such an occupation as carries with it the evidence of ownership; something that can be seen, something that asserts itself to all the world.

The defendant's "post holes" dug upon the plaintiff's property without his knowledge, and apparently without the knowledge of any person, saving only himself, does not constitute such an unequivocal, open, notorious and exclusive possession of the lot as to authorize him to claim the same as an occupant. These acts of the defendant do not so contain the elements of occupation and possession as to authorize him to claim the property as against one who at the time of such acts was, and for many years prior thereto had been, the apparent owner and possessor of the property. There was nothing in the acts of the defendant to show that the lot had been subjected to his will and dominion to the exclusion of others, and especially not to the exclusion of the plaintiff, who, notwithstanding the acts of the defendant, remained the apparent owner and occupant of the property. If the lot had been vacant, unclaimed and unoccupied, then the entry and acts of the defendant would perhaps have been sufficient to have authorized him to make and file a statement of claim, but the lot being at the time in the actual occupation and possession

of the plaintiff under a claim of right, and as the equitable owner, it was necessary for the defendant to make his possession and occupation an actual, unequivocal, open, notorious fact, accompanied with the usual and ordinary evidences of dominion and exclusive ownership, before he became entitled to set up his claim. The statement of claim by the defendant was then a mere nullity. No rights of his attached to the lot thereby. The probate judge did not become his trustee, holding the title in trust for his benefit, and hence there was nothing in the acts of defendant to prevent the plaintiff making a valid claim to the lot after the time limited in the notice.

The case of *Cofield v. McClellan et al.*, 1 Col. 372, referred to in respondent's brief as an authority upon the proposition that the failure to make statement of claim within the time limited forfeits the right, is not parallel to the case we have considered, neither as to the law under which it arose, nor as to the facts by which it was controlled. The Colorado act, under which the city of Denver was entered, declared that all persons failing to deliver the statement of claim within the time specified should be forever barred the right of claiming or recovering the property claimed. There is no such provision in our act, and the facts in the case show that for years prior to the date of the deed from the probate judge to the defendant's grantors, neither the plaintiff nor his grantors had been in possession of the lot in dispute. It appears that on the 11th day of August, 1865, the probate judge conveyed the lot in question to Mary McClellan, who subsequently conveyed to the defendant, Mary Davis. In April, 1869, the plaintiff, having failed for nearly five years to set up any claim to the lot, commenced an action to recover the same, and rested his claim upon the fact that in the year 1859, one Preston erected a cabin on the premises, and in the same year conveyed to one Hall, who by tenants occupied the cabin at different times down to about 1862, and from 1862 to 1865, when the probate judge conveyed to the defendant, neither the cabin nor the premises appear to have been occupied by any one. In 1866, more than a year after the conveyance by the probate judge, Hall, not being in possession of the cabin or premises, conveyed

the same to one Felter, and subsequently Felter to Bates, and Bates to the plaintiff in 1869, who, in that year, commenced the action to recover the premises. Under these facts the case is not an authority upon any of the propositions we have considered. It therefore appears that the defendant Mellen made his statement of claim with no right or equity whatever upon which to rest the same, and we hold that a claim so made is void, and cannot defeat or in any manner affect the rights and equities of a *bona fide* occupant, who for years had possessed and improved his lot, even though he had failed for a few hours to bring himself within the time limited in the notice. Mellen made his claim while yet the right remained in the plaintiff to make his claim to the lot under the notice, and if by occupancy and possession of the property, the right was with the plaintiff, it necessarily follows that the defendant was not entitled to claim, for a lot cannot be so occupied and possessed by two hostile and adverse claimants, as rightfully to entitle each of them to make and file a statement of claim at the same time. And if Mellen had no right to claim when he made his statement; if his act were void in its inception, nothing subsequently occurred to ripen or perfect his claim or to give vitality to his act and make it valid.

The judgment is reversed, and the cause remanded with directions to the district court to enter a decree herein in conformity with the views expressed in this opinion.

KNOWLES, J. I concur in the conclusion arrived at.

*Judgment reversed.*

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TERRITORY OF MONTANA, respondent, v. OWINGS, appellant.

CRIMINAL LAW — *reasonable doubt — contradictory instructions.* A reasonable doubt is such an one, that before a juror should find a defendant guilty of crime, he ought to be so convinced of his guilt by the evidence as that he would be willing to act upon such conviction in matters of the highest interest and greatest concern to himself. So long as moral certainty is not reached, a reasonable doubt may be said to remain on the mind. This degree of moral certainty is required in criminal cases. Instructions admitting a lower degree of doubt, or that are contradictory and irreconcilable, furnish good ground for reversal.

*Appeal from Second District, Deer Lodge County.*

SHARP & NAPTON, for appellants.

The indictment should specify with certainty upon whom the offense was committed. 19 Ala. 540; U. S. Dig. Crim. Law, 650, § 21.

In case of a female over ten years of age there should be evidence of resistance. *People v. Morrison*, 1 Park. Crim. Law, 644; *People v. Abbott*, 19 Wend. 192; *Walter v. People*, 50 Barb. 144.

The court erred in instructing the jury as to what constitutes a reasonable doubt. 11 Nev. 343.

The verdict did not justify the judgment. Bish. on Stat. Cr., § 491; 11 Ga. 225; *Com. v. Cooper*, 15 Mass. 186; 1 Chitty's Crim. Law, 639; *Territory v. Stears*, 2 Mon. 324.

The instruction of the court was not based upon the statutory definition of the crime; "without her consent," is not the same as "against her will." 2 Bish. Cr. Law, § 1072, and notes at bottom of page, also at bottom of page 1081.

A. E. MAYHEW, for respondent. No brief filed.

WADE, C. J. Indictment for rape; trial by jury; verdict for plaintiff; judgment on the verdict; motion for new trial overruled and appeal to this court.

The only question we will consider in this case arises upon the instructions given by the court to the jury upon the subject of "reasonable doubt." The instruction given by the court at the instance of the defendant is as follows: "A reasonable doubt is such a doubt existing in a person's mind as that he will not act upon it in matters of the highest and greatest importance."

The instruction given by the court on its own motion upon this subject, is as follows: "A reasonable doubt is not every doubt that may enter into the mind of a juror, but such a doubt as would influence a man in his own important transactions. It is such a doubt as would force a juror to say I am not fully satisfied that the guilt of the defendant has been established by the evidence."

The meaning of the first instruction is, that before a juror

should find a defendant guilty of crime, he ought to be so convinced of his guilt by the evidence, as that he would be willing to *act* upon such conviction in matters of the highest interest and greatest concern to *himself*. When so convinced he is morally certain. So long as moral certainty is not reached, a reasonable doubt may be said to remain on the mind. When all reasonable doubt is removed, moral certainty follows. Burrill on Cir. Ev. 200. This is the rule of certainty required in criminal cases. The second instruction provides a different rule and lowers the standard of certainty required. It authorizes the jury to convict when so convinced of the defendant's guilt, as that the jurors would act upon a conviction of like character and force in their own important matters. This does not reach the degree of certainty required. This is not a moral certainty, and only such certainty excludes a reasonable doubt.

The degrees of certainty required by the two instructions are contradictory and irreconcilable, and we have no means of knowing which one the jurors followed in finding their verdict.

It is well settled that where the instructions to the jury taken together correctly state the law, the judgment will not be reversed because parts of them taken separately might be erroneous. But where the instructions set up for the jury contradictory rules for their guidance which are unexplained, and following either of which would or might lead to different results, then the instructions are inherently defective and calculated to confuse and mislead the jury. *Price v. Mahoney*, 24 Iowa, 582; *People v. Campbell*, 30 Cal. 312; *Hamilton v. State Bank*, 22 Iowa, 306; *Bradley v. The State*, 31 Ind. 492; *Kirkland v. The State*, 43 id. 146; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1.

In the case of *The Territory v. McAndrews*, decided at this term, we have discussed the meaning of the words "reasonable doubt," as used and applied in criminal cases, and the degree of certainty required to compel a conviction. It is unnecessary to repeat what is therein said, or to again cite the authorities. There is no other error appearing in the record. The judgment is reversed and the cause remanded for a new trial.

*Judgment reversed.*

## BEATTIE, respondent, v. HOYT, appellant.

PRACTICE — *appeal dismissed when no proper judgment or order was entered.* Upon the trial the court below excluded the evidence of the plaintiff, refused to hear any testimony for the defendant, discharged the jury, dismissed the action and declined to enter any judgment for or against either party. *Held*, that there was no judgment or order from which the statutes of the Territory allow an appeal to be taken, and this court of its own motion dismissed this appeal.

*Appeal from Third District, Lewis and Clarke County.*

THIS action was tried by WADE, C. J.

SHOBER & LOWRY, for appellant.

The court below vested a title in respondent to the property in controversy, and erred in not placing appellant in the condition he was in before the suit was commenced. Appellant was not voluntarily in court, and the buggy was in possession of respondent through the process of the court. It had been taken from appellant by an officer of the law and delivered to respondent, who brought the action. The court below decided that respondent could not maintain his case, and that he had no title to the buggy, but by its refusal to enter judgment, put respondent in the same position as if he had recovered judgment for the possession of the property. Judgment should have been entered for a return of the buggy to appellant, or its value. *Dahler v. Steele*, 1 Mon. 206; *Morris on Replevin*, 141; *Wilson v. Wheeler*, 6 How. Pr. 50; *Dowling v. Polack*, 18 Cal. 625; *Leese v. Sherwood*, 21 id. 151.

SANDERS & CULLEN, for respondent.

We concede that the transaction between appellant and respondent was illegal, and the parties were *in pari delicto*. In such a case neither courts of law or equity grant relief to participants by canceling what is executed, or enforcing what is executory. *Schermerhorn v. Talman*, 14 N. Y. 93; *Bartle v. Nutt*, 4 Pet. 184; *Moore v. Adams*, 8 Ohio, 375; *Cowles v. Raguet*, 14 id.

38; *Bolt v. Rogers*, 3 Paige, 154; 1 Story's Eq. Jur., §§ 61, 296; *Martin v. Wade*, 37 Cal. 175; *White v. Franklin Bank*, 22 Pick. 181.

The record does not show that respondent had possession of the buggy. The owner can claim and recover the property at any time. The cases cited by appellant are inapplicable. They are generally those in which plaintiff upon his own motion dismissed his action and there was no fraud or illegality in either title.

BLAKE, J. The respondent commenced this action in the probate court to recover the possession of a buggy and obtained a judgment therefor. The appellant then appealed to the district court, and a jury was impaneled to try the cause, and the respondent testified. The following facts appear in his testimony. His claim to the possession of the property was based upon the purchase of a ticket which was delivered to him by the agent of the owner of the buggy. The respondent, having no money at the time, offered to give his check for the price of the ticket, but was told that he could pay for it at any time. The holder of the ticket was entitled to throw the dice at a raffle, and the proxy of the respondent won the buggy in the absence of the respondent. The appellant, as the agent of the owner of the buggy, refused to deliver it to the respondent because the money had not been paid for the ticket before the dice were thrown, and asserted a claim thereto by virtue of the same ticket. The respondent seems to have had no other interest in the property. After the testimony of the respondent was concluded, the appellant moved to exclude the same from the consideration of the jury, and the court sustained the motion.

The appellant then offered to prove that he had bought the buggy of its owner, but the court refused to hear any further testimony, discharged the jury, dismissed the action and declined to enter any judgment for or against either party. The appellant supports the ruling of the court below, respecting the dismissal of the cause, but contends that there should have been a judgment for the return of the buggy to him, or its value, if a delivery thereof could not be had.

We think that the appellant has no right to be heard at this time in this court. It appears from the transcript on appeal that no judgment or order, final or otherwise, has been entered. An examination of the Civil Practice Act, defining the judgments and orders from which an appeal may be taken to this court, shows that it does not embrace any matter of which the appellant complains. Civ. Pr. Act, §§ 369, 380. Therefore we will follow the case of *Rader v. Nottingham*, 2 Mon. 157, and dismiss the appeal on our own motion.

Although we have disposed of this appeal, it is deemed proper to quote with approval the following extract from the opinion of Mr. Justice BELFORD, in *Eldred v. Malloy*, 2 Col. 321: "The courts of this Territory have enough to do without devoting their time to the solution of questions arising out of idle bets made on dog and cock-fights, horse-races, the speed of ox trains, the construction of railroads, the number on a dice or the character of a card that may be turned up."

*Appeal dismissed.*

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COLLIER, respondent, v. ERVIN ET AL., appellants.

**PLEADING — effect of answer.** An answer is a waiver of a motion to strike out complaint or amendment thereto for want of proper verification, and also of any advantage that might have been taken by demurrer.

**COUNTER-CLAIM.** A counter-claim founded upon a tort cannot be set off against one founded on contract, unless it arose out of the transaction set up in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action.

**CONSTRUCTION.** The words of the statute, "subject of action," should be construed to refer to the origin and ground of plaintiff's right to recover or obtain the relief sought, rather than as relating to the thing itself about which the controversy has arisen.

**COUNTER-CLAIM.** An individual claim cannot be set up as a counter-claim to a joint indebtedness without alleging that the plaintiff is insolvent.

*Appeal from First District, Jefferson County.*

THIS cause was tried in the court below by BLAKE, J.

CHUMASERO & CHADWICK, and E. W. TOOLE, for appellants.

Complaint and amendment should have been stricken from the files for want of proper verification.

Defendant's demurrer for insufficient description of parties by name in complaint and summons should have been sustained. *Wiebbold v. Hermann*, 1 Mon. 609.

Other causes of demurrer were well taken. There was a variance between allegation of complaint and the exhibit. There was no averment of partnership, or that either were authorized to sign their joint names.

The instrument sued on was a contract simply to pay property, not a promissory note, and should have set out the consideration. *Haline v. Redwick*, 16 Ill. 371. On such a contract demand is first necessary for the thing contracted to be delivered before it becomes a money demand. The mortgages mentioned in complaint were between different parties and on several pieces of property.

The striking out of the averments of Page's ownership was error.

The amount taken from the mortgaged premises by the mortgagee before foreclosure was a proper counter-claim. 1 Hill. on Mort. 448, ch. 16, note; 13 Cal. 116; 28 id. 301; 15 id. 287; 5 Pick. 259; 11 Ill. 61; *Twogood v. Franklin*, 17 Iowa, 239; Freeman on Judg., § 481.

The counter-claim arose out of the transaction and was connected with the subject of it. Counter-claim embraces both set-off and recoupment. *Vassear v. Livingstone*, 3 Kern. 257; 22 Barb. 146; 52 id. 132; 10 How. Pr. 67; 33 Cal. 495; 13 Iowa, 136; 12 Ind. 46; 1 Van Sant. Eq. Pr. 211, and cases cited.

In an equitable proceeding equitable defenses should be admitted. The counter-claim should have been allowed to Metcalf and also to Page.

SANDERS & CULLEN, and SHOBER & LOWRY, for respondent.

Defendant's counter-claim is no proper subject of recoupment. It arose in tort and not out of same transaction. *Slayback v. Jones*, 9 Ind. 470; 120 Mass. 284; 9 Allen, 39; *Drake v. Crockett*, 4 E. D. Smith, 34; Cod. Sts. Civ. Pr. Act, §§ 56-7.

The counter-claim is not pleaded by parties to whom it accrued.

Collier was in possession under decree of court and was not liable for use and occupation. He was not a trespasser, because his possession was justified by his deed. Freeman on Judg., § 483.

The rule in the *Wiebbold case*, 1 Mon. 609, was not invoked in proper time and manner. It cannot be taken advantage of on appeal.

There is sufficient allegation to admit proof and no denial.

There was a proper allegation of demand in gold dust and a refusal.

The money due was the principal thing; the security was but an incident. It was on different pieces of property. The decree could appropriate each security to its proper debt. 2 Mon. 338.

The payment by Page to Profit was on an entirely different claim, wholly voluntary and not traced to plaintiff. The sale from which Page redeemed the property was under a decree that was never reversed.

KNOWLES, J. I will consider the points presented by appellants in their brief in the order of presentation.

If there was any validity in the motion of appellants to strike out the complaint and amendment thereto, for want of a proper verification, the same was waived by demurring and answering to said complaint and amendment.

The court properly overruled the demurrer of Ervin and Page; but if there had been any error in such ruling the defendants waived such error by answering to the merits of the complaint. For the same reason Metcalf waived any error that may have occurred in overruling his demurrer. He filed his answer to the merits of the complaint, subsequently. *Perkins v. Davis*, 2 Mon. 474; *Gale v. Tuolumne Water Co.*, 14 Cal. 28; *Abbott v. Striblen*, 6 Iowa, 191; *Mitchell v. The Wiscotta Land Co.*, 3 id. 209.

The fourth ground of defense set forth in the answer of Ervin and Page is that at the time of the commencement of this action defendant Page was the owner of an undivided half of

the property described in the complaint, and at the time of filing the answer was the owner of all of the same. This is set forth as though it were a separate ground of defense. Why such a defense should prevent the respondent from recovering a judgment on certain accounts for money paid out and the amount due on a promissory note, I am unable to perceive, or why, notwithstanding, this respondent should not foreclose his mortgage given to secure these sums I do not comprehend. If this allegation, however, is to be taken in connection with the next defense, which is a counter-claim for an alleged trespass and waste upon the property mortgaged, owned by appellants, I do not think it adds any thing to it. That is a counter-claim based upon a tort or trespass and is for unliquidated damages. All of the allegations in the answer, that the respondent has failed to account for the gold extracted and the water sold, do not make this counter-claim, under the allegations in the answer, any thing but an action founded upon a tort. A counter-claim founded upon a tort cannot be set off against a claim founded upon contract. *Wells v. Clarkson*, 2 Mon. 379.

The counter-claim must arise out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action. This counter-claim did not arise out of the transaction of the payment of Ervin and Metcalf's notes by Rader or Blacker, or the execution and delivery of the note to the respondent. Neither is it a matter that arises out of the subject of the action. The words in our statute, "subject of the action," should be construed, not as relating to the thing itself, about which the controversy has arisen, but as referring rather to the origin and ground of the plaintiff's right to recover or obtain the relief asked. *Moak's Van Sant*. Plead. 627-8.

As I have said, the counter-claim is founded upon a tort — a trespass. It does not connect itself with the origin of the above causes of action, and it is not founded upon a contract. It is not then a proper cause for a counter-claim. Cod. Sts., Civ. Pr. Act, § 57.

The counter-claims set forth in the answer of Metcalf were of  
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the same nature or were in fact the same as the above counter-claim.

Both were properly stricken out, as I have shown above.

The counter-claim set forth in Ervin and Page's amended answer, and numbered *six*, certainly cannot be said to have arisen out of any of the contracts sued upon, and I think it is a counter-claim founded upon a tort, the issuing of an execution and sale of property, under a void judgment. But if I am not correct in this, then for other reasons the counter-claim could not be interposed. It was a claim due Page, individually. An individual claim cannot be set up as a counter-claim to a joint indebtedness without alleging that the plaintiff is insolvent. *Kemp v. McCormick*, 1 Mon. 420. Again the respondent was seeking no money judgment against Page. As to him, he only sought to foreclose a mortgage upon certain property in which he, Page, had an estate. There was no ground for his setting up such a claim unless some equities were set forth justifying it.

*Judgment affirmed with costs.*

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**BANK OF DEER LODGE, appellant, v. HOPE MINING COMPANY,  
respondent.**

PRINCIPAL AND AGENT — *agent authorized to draw bill of exchange in his name cannot draw in name of principal.* The president of the Hope Mining Company sent the following telegram from St Louis, Mo., February 23, 1874; "To Joseph Alger, Philipsburg. Care for company's property. See that McArdle has what he needs. If funds needed, draw on company. CHAS. C. WHITTLESEY." McArdle died before the message was delivered. A bill of exchange for \$500 was drawn March 26, 1874, and signed "Hope Mining Co. by Jos. M. ALGER," which was discounted by the First National Bank of Deer Lodge and paid by the company. A similar bill for \$1,000 was drawn May 18, 1874, and discounted by the bank, which was not paid by the company, and the bank brought this action thereon. The officers of the bank made no inquiries relating to the authority of Alger and did not see the telegram. From March 26, 1874, to about May 18, 1874, Alger checked against certain money of the company which was deposited in Deer Lodge and Helena, in this Territory. *Held*, that the telegram authorized Alger to draw on the company in his own name for money for a particular purpose, and that it did not author-

ize him to sign the name of the company to the bills. *Held, also*, that the payment of the checks and the first bill by the company did not estop the company from disputing the right of Alger to draw the second bill. *Held, also*, that the bill in controversy can be treated by the holder, as an accepted bill or a promissory note, that Alger had no authority to make such an instrument, and that the company was not bound to pay the same.

CASE AFFIRMED. The case of *Herbert v. King*, 1 Mon. 475, holding that the principal is responsible for the acts of his agent while acting within the scope of his authority, and that courts will not enlarge this liability, affirmed.

*Appeal from Second District, Deer Lodge County.*

THIS action was tried by the court, KNOWLES, J., without a jury.

SHARP & NAPTON, for appellant.

The telegram constituted Alger an agent of the respondent and authorized him to draw the draft in suit. If respondent authorized the drawing of the draft by Alger, or authorized appellant, as a fair and reasonable party, to believe that the authority had been given, it is bound by the acts of the party acting as agent. 1 Pars. on Notes and Bills, 100, 101; Chitty on Bills, \* 30, \* 31.

The drawing of one draft, directed and signed like the one in suit, which was accepted and paid by respondent, coupled with the fact that Alger was authorized to check and did check against the funds of respondent in Deer Lodge and Helena, was sufficient to authorize appellant, as a reasonable party, to believe he had authority to draw the draft in suit, and to show the manner of exercising this authority. Under certain circumstances, authority to bind the principal in one form might be evidence throwing light on the question of authority to bind him in another. 1 Dan. on Neg. Inst. 218, 219.

It is not necessary that appellant should have seen the authority before the money was paid on the draft. If the agent had the authority, that is sufficient. Bateman on Com. Law, §§ 498, 500.

The evidence shows that Alger drew the draft by virtue of his agency for respondent and the telegram. There is no evidence that Alger had any private funds in respondent's hands.

W. W. DIXON, for respondent.

A party dealing with an agent is bound at his peril to know what the power of the agent is, and if the agent exceeds his power the principal is not bound. 1 Pars. on Notes and Bills, 119; *Blum v. Robertson*, 24 Cal. 140; *Herbert v. King*, 1 Mon. 475; Story on Agency, §§ 165, 169.

The acts of an agent in making negotiable paper for his principal are restrained. 1 Pars. on Notes and Bills, 107; Story on Agency, § 59. An authority to make such paper cannot be inferred from one or two instances of recognition. 1 Pars. on Notes and Bills, 100.

The telegram was the only authority for Alger to act. This was not addressed to him as agent and did not make him such. Alger was authorized in a certain contingency to draw in his own name on respondent, but he could not draw in the name of respondent.

The instrument that Alger drew was a promissory note in law. 2 Greenl. Ev., § 160; 1 Pars. on Notes and Bills, 62. The drawing in this case was an acceptance and no presentment for acceptance or notice of non-payment is necessary. 1 Pars. on Notes and Bills, 281, 521.

Alger departed from his authority in a substantial particular and respondent is not bound.

BLAKE, J. The appellant brings this action to recover upon the following bill of exchange:

“\$1,000.00.

DEER LODGE, M. T., *May 18th*, 1874.

At sight, pay to the order of the First National Bank, Deer Lodge, one thousand dollars. Value received, and charge the same to account of

HOPE MINING CO.

To CHAS. C. WHITTLESEY, Prest.

By JOS. M. ALGER.

Hope Mining Co.,  
St. Louis, Mo.”

{ Stamp. }

Indorsement — “Pay the Security Bank, or order, for collection, account of First National Bank, Deer Lodge, Montana.

W. A. CLARK, *President*.”

The appellant has been incorporated under the laws of the United States and is engaged in a general banking business. It discounted the bill upon its date and paid the proceeds to Alger. The respondent has been incorporated under the laws of the State of Missouri and is mining some quartz lodes at Philipsburg and has an office in St. Louis, Missouri. The appellant demanded payment of the bill at the office in St. Louis, May 27, 1874, and the respondent refused to accept or pay the same. Notice of its presentment and non-payment was properly given.

The respondent denied that Alger was its agent and claimed that he had no authority to draw the bill. The court below rendered judgment for the respondent upon these grounds, and also found that it was the custom of the respondent in drawing drafts upon itself to direct them to Chas. C. Whittlesey, president of the Hope Mining Company. The only authority of Alger to draw the bill is contained in the following telegram, which was transmitted by the Western Union Telegraph Company.

“Dated St. Louis, *Feb. 23d*, 1874.

Received at ———.

To JOSEPH ALGER, Philipsburg :

Care for company's property. See that McArdle has what he needs. If funds needed, draw on company.

CHAS. C. WHITTLESEY.”

This telegram was received by Alger about February 25, 1874, after the death of McArdle. One bill of exchange for \$500 was drawn by Alger, March 26, 1874, which was discounted by the appellant, and afterward accepted and paid by the respondent. The proceeds were expended for the benefit of the respondent. This bill was signed in the same manner as that involved in this action, and all the parties were the same. No other bills were drawn on the respondent by Alger, but during the months of February, March and April, 1874, Alger checked against some funds of the respondent in Deer Lodge and Helena. Alger was not in the employ of the respondent when the second bill was drawn, and the proceeds were used in defraying the expenses of Mrs. McArdle and her family from Philips-

burg to St. Louis. The officers of the appellant did not make any inquiries respecting the authority of Alger to sign these bills, or the purposes for which they were drawn, and never saw the telegram.

We must consider the relations of Alger and the respondent which affect the rights of the appellant. It is evident that the telegram authorized Alger to draw upon the respondent for money for certain objects. Did it constitute Alger the agent of the respondent, and empower him to sign the bill in that capacity? Did the officers of the respondent authorize those of the appellant, with whom Alger dealt, to believe as fair and reasonable men that this authority had been actually given to Alger? An examination of the law of Agency will enable us to determine these questions, and if we find that either of them should be answered in the affirmative, we must decide that the respondent was bound by the acts of Alger. 1 Pars. on Notes and Bills, 100, 101, and cases there cited.

Some of the principles, which are applicable to these questions, have been announced by this court in the case of *Herbert v. King*, 1 Mon. 475. It was held that the principal is responsible for the acts of his agent, when they have been done within the scope of his authority, and that "courts will not tolerate any enlargement of this liability." The bill shows that Alger claimed to be the agent of the respondent, and it was the duty of the officers of the appellant to ascertain the extent of his power before they discounted it. In *Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 N. Y. 631, Mr. Justice COMSTOCK says: "Whoever proposes to deal with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry, he deals at his peril." *Blum v. Robertson*, 24 Cal. 140 and cases there cited. In this action, the burden of proving that Alger was the agent of the respondent in drawing the bill is on the appellant. Add. on Cont., § 57. The power of an agent to make the principal a party to negotiable paper is always restricted by the courts. "So carefully is this authority watched, that, where power is given to do some things with regard to promissory notes or bills,

it cannot be enlarged by construction to do other, though somewhat similar, things." 1 Pars. on Notes and Bills, 107.

This doctrine may be illustrated by the following authorities. An agent who is authorized to draw and indorse bills of exchange in the name of his principal has no power to draw or indorse the bills in his own name, or in the joint name of himself and his principal. *Stainback v. Read*, 11 Gratt. 281. The agent of a corporation who was authorized to borrow money from a bank and execute the note of the corporation therefor could not bind his principal by borrowing the money and executing a bond for the same under the seal of the corporation. *Little Rock v. State Bank*, 3 Ark. 227; Story on Agency (7th ed.), § 165. An authority to draw is not an authority to indorse or accept bills. 1 Pars. on Notes and Bills, 107, and cases there cited. In *Tate v. Evans*, 7 Mo. 419, the agent was authorized November 28, 1839, to draw a bill of exchange "at four months' date," and the bill was actually drawn December 23, 1839, and ante-dated November 28, 1839, and payable "four months after date." The court held that the bill was not in conformity to the authority conferred on the drawer and that the principal was not bound.

The authority of Alger to draw checks on the money of the respondent in this Territory is wholly distinct from that of drawing a bill of exchange on the respondent in Missouri. The power to exercise one of these acts does not include the other, and the fact that Alger checked against the funds of the respondent during the time which has been mentioned does not tend to prove that he had the authority to draw the bill in controversy.

The appellant maintains that the facts which have been referred to would authorize the officers of the appellant, as fair and reasonable men, in believing that Alger had the right to draw the bill. In other words, the argument is that the respondent is estopped from disputing that Alger had the authority he exercised respecting the bill. The officers of the appellant made no effort to ascertain the power of Alger, and appear to have assumed that the payment of the first bill by the respondent was a sufficient recognition of the authority of Alger, in drawing the second bill. If Alger had repeatedly performed acts like the one in dispute,

which had been ratified by the respondent, the officers of the appellant could presume that he was authorized to draw the bill. But this conclusion could not be inferred from one instance of such recognition. The legal effect of the ratification of an unauthorized act is equivalent to the previous delegation of authority to do the act. This ratification, however, does not operate as presumptive evidence of original authority, but as a confirmation *per se* of the unauthorized act. *Commercial Bank v. Warren*, 15 N. Y. 577. In *Cook v. Baldwin*, 120 Mass. 317, the court held that the part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder.

We are now brought to the consideration of the telegram from Whittlesey to Alger, and the rights of the parties to the action must depend upon its interpretation. What is the character of the instrument which Alger signed? It is a bill drawn by the agent of a corporation upon itself and may be treated as an accepted bill or a promissory note, at the election of the holder. 1 Pars. on Notes and Bills, 62, 288, and cases there cited; 2 Greenl. Ev., § 160, and cases there cited. Alger had no authority to make such a bill or note; he was a special agent, and his power was accurately limited. The telegram did not describe or recognize Alger as an agent of the respondent, but authorized him to draw in his own name on the respondent, if money was needed for a particular purpose. It is not necessary for us to pursue this inquiry into the effect of the acts of Alger on the rights of all the parties to the bill. Alger violated his instructions and the respondent is not bound by his action in drawing the bill.

The purchaser of the bill should have exercised prudence and examined the telegram to see whether it justified the act of Alger. "And if, from his omission to call for or to examine the instrument, he should encounter a loss from the defective authority of the agent, it is properly attributable to his own fault, since he must know that he has no other security than his reliance upon the good faith and credit of the agent." Story on Agency (7th ed.), § 72, and cases there cited. The judgment is affirmed.

*Judgment affirmed.*

## CURTIS, respondent, v. VALITON ET AL., appellants.

PLEADING — *use of initial letter for Christian name.* If the instrument sued on is defective in using only the initial letter, instead of full Christian name, the same may be cured by proper averment in pleading and proof on trial. Case of *Wiebbold v. Hermann*, 2 Mon. 609, considered and affirmed.

INTEREST. Where a new note is given to take up former notes on which compound interest has been computed and included, *held*, that the new note is void only to the extent of such compound interest included.

FRAUD. To render a conveyance fraudulent as against creditors, there must be mutual participation in the fraudulent intent on the part of both grantor and grantee.

*Appeal from Second District, Deer Lodge County.*

THE judgment was rendered by KNOWLES, J.

SHARP & NAPTON, for appellants.

The case of *Wiebbold v. Hermann* decides a pleading void for uncertainty by using initials only for Christian name. For the same reason a mortgage in the same condition should be held void. A conveyance void in part is void *in toto*, upon the same principle that a law unconstitutional in part is so altogether. *United States v. Reed*, 2 Otto, 221.

There is a material difference between fraud in law and fraud in fact, as in the case of a conveyance made by a debtor to his wife.

The instrument in this case must be reformed before proceedings can be maintained.

W. W. DIXON, for respondent.

The demurrer was properly overruled. An unrecorded deed or mortgage is good against creditors. *Hunter v. Watson*, 12 Cal. 363; *Pixley v. Huggins*, 15 id. 127.

2 Wash. on Real Prop. (3d ed.) 263-5, gives the correct rule as to the use of names in conveyances. See, also, 4 Bacon's Abr. 516, and notes; *Garwood v. Hastings*, 38 Cal. 222.

An agreement to pay interest on interest when due is valid.

5 Paige, 100 ; 3 Pars. on Cont. 150-2 ; 4 Otto, 437 ; *Wilson v. Davis*, 1 Mon. 183, not in conflict.

The excluded evidence, of which appellants complain, fully disproves fraud. Judgment will not be reversed even for errors which work no injury. *Caruthers v. Pemberton*, 1 Mon. 111 ; *Gregg v. Moss*, 14 Wall. 564 ; *Walker v. Hawkhurst*, 5 Blatchf. 494 ; *Kisling v. Shaw*, 33 Cal. 425 ; *Mott v. Reyes*, 45 id. 379.

An instrument void in part is not always void *in toto*. 2 Kent, 467 ; *United States v. Bradley*, 10 Peters, 343.

If compound interest is not recoverable the mortgage is still good for the amount properly due. *Spencer v. Ayrault*, 10 N. Y. 203 ; *Burnhisel v. Firman*, 22 Wall. 170 ; *Morris v. Way*, 16 Ohio, 469 ; 1 Hill. on Mort. 609-11 ; *Chase v. Walters*, 28 Iowa, 460 ; *Parker v. Barker*, 2 Metc. 423 ; *Sanford v. Wheeler*, 13 Conn. 165 ; 81 Penn. 310 ; 30 Ill. 158 ; *Tully v. Harloe*, 35 Cal. 303.

To make a conveyance fraudulent as to the grantee, and void, fraud must be shown on his part as well as on the part of the grantor. See authorities cited in 6 U. S. Dig. (1st series), 674 ; 1 Hill. on Mort. 620 ; *Chase v. Walters*, 28 Iowa, 460 ; *Kittredge v. Sumner*, 11 Pick. 50 ; *McCormick v. Hyatt*, 33 Ind. 546.

Under our statutes fraudulent intent is always a question of fact. Cod. Sts. 394, § 20.

The burden to show fraud was upon appellants and was not shown, either in fact or law.

WADE, C. J. This is an action by plaintiff to foreclose a mortgage against the defendant Heath ; the other defendants are judgment creditors who seek to set aside the mortgage as fraudulent and void.

The first question raised by the contesting defendants, which arose upon a demurrer to the complaint, is that the mortgage is void for uncertainty, in that the mortgagee is described in the mortgage as Mrs. A. R. Curtis ; that such a designation is not a name ; that the mortgage fails to name a mortgagee, and is therefore void. The case of *Wiebbold v. Hermann*, 2 Mon. 609, is

chiefly relied on to support this position. That case was also an action to foreclose a mortgage wherein the mortgagee was described as H. C. Wiebbold. As a matter of pleading under our Code, which requires the complaint to state the names of the parties, plaintiff and defendant, and upon the authorities under Codes similar to our own, where it had been held that the complaint should state the full Christian name of the parties, and that the omission so to do, unless excused by averment, made the pleading uncertain and indefinite, we held that the designation H. C. Wiebbold was not a name in contemplation of law, and that, unless cured by averment, a complaint so describing the plaintiff was defective for uncertainty. But in that case, which, like the one under consideration, was an action to foreclose a mortgage, it was expressly held that the defect might be cured by averment; "and that if a party brings an action upon an instrument wherein he is designated by the initial letters of his name," he must aver in his pleading and establish by the proof what his name really is. The pleader in the present case brings himself within this requirement, and the case referred to overthrows the objection of the defendant and upholds the sufficiency of the complaint.

2. The note upon which the action is brought was given in payment of three certain other notes for money loaned by plaintiff to the defendant Heath, bearing interest at the rate of two per cent per month from date until paid and payable on demand. On the 5th day of October, 1875, a settlement was had between the plaintiff and Heath, and the sum of \$5,571.42 found due from him to the plaintiff on said three notes, for which sum the note sued on was given in payment, and that compound interest amounting to \$237.58 was computed upon such three notes and included in the note given in payment of the same, in pursuance of a parol agreement between plaintiff and defendant Heath, at the time said three notes were given.

It having been determined in this Territory that compound interest is not warranted by law (*Wilson v. Davis*, 1 Mon. 195), the defendants contend that the note given in payment of the three notes above mentioned, and the mortgage by which the same is secured, a portion of which note is for compound inter-

est which was computed upon the three notes, are, by reason of such fact, fraudulent and void as against creditors, though there was no actual fraud upon the part of the parties in having such compound interest included in the note. This claim of the defendants is effectually set at rest by the case of *Burnhisel v. Firman*, 22 Wall. 170, wherein it is held, in a similar case, that where the parties calculated interest on the old securities at a higher rate than is authorized by law, and make a settlement upon such basis and the debtor gives new notes, and a mortgage for the whole sum, including the illegal interest, such securities are valid for the amount that would be due on a proper calculation of interest, and are void only as to the excess above legal interest. See, also, 3 Pars. on Cont. 150; *Spencer v. Ayrault*, 10 N. Y. 203; *Morris v. Way*, 16 Ohio, 469; 1 Hill. on Mort. 609-611; *Culbertson v. Luckey*, 13 Iowa, 12; *Boyd v. Brown*, 17 Pick. 453; *Sanford v. Wheeler*, 13 Conn. 165; *Fleet v. Warren*, 42 N. Y. 204; *Howard v. Woodstock*, 81 Penn. 310; *Mowry v. Bishop*, 5 Paige, 98.

To this extent the note and mortgage in question were held void upon the trial, and the plaintiff was permitted to recover a judgment only for the amount of the note and legal interest. The claim that they are void *in toto* is conclusively answered by the authorities cited.

3. At the time of the execution of the note and mortgage to the plaintiff by Heath, the defendants proposed to prove that Heath sold his entire herd or band of cattle to one Morrill, his brother-in-law, and brother of plaintiff; that such sale was fraudulent, and that the plaintiff was present at such sale and knew its character. This proposed testimony was not received, and the defendants excepted.

There was no testimony in the case tending to show that the transaction between the plaintiff and Heath was in any manner tainted with dishonesty or fraud. The defendants offered to prove a fraudulent transaction between Heath and another party, of which the plaintiff had knowledge, but was in no manner a party thereto or interested therein; and from such proof to ask the court, who tried the case without a jury, to infer or to

prove some fraud between Heath and the plaintiff in the execution of the note sued on. Was such proof competent? The question is fully answered in *Jordan v. Osgood*, 109 Mass. 457, in which case the court says: "The cases are numerous in which this subject has been discussed. We think the true rule to be deduced from them is that another act of fraud is admissible to prove the fraud charged, only where there is evidence that the two are parts of one scheme or plan of fraud committed in pursuance of a common purpose."

The required evidence under this rule was entirely missing, and on the contrary, the transaction between the plaintiff and Heath was shown to be without fraud and wholly legitimate and honest. It could not therefore have formed any part of a plan or scheme of fraud committed in pursuance of a common purpose. Men do not commence a scheme of fraud by paying their honest debts. The proposed testimony was properly rejected. See, also, *Haskins v. Warren*, 115 Mass. 515; *Brown v. Shock*, 77 Penn. 471; Bigelow on Fraud, 478; Whart. Ev., § 33.

To render a conveyance fraudulent as against creditors there must have been a mutual participation in the fraudulent intent on the part of both the grantor and grantee. *Steele v. Ward*, 25 Iowa, 535; *Miller v. Byron*, 3 id. 58; *Chase v. Walters*, 28 id. 460; *Kittredge v. Sumner*, 11 Pick. 50; *McCormick v. Hyatt*, 33 Ind. 546. The evidence does not show any fraudulent intent upon the part of either the grantor or grantee in the execution of the mortgage herein.

There was no error in the admission of testimony in explanation of the reason why compound interest was computed upon the three notes and included in the one given in payment thereof. The judgment is affirmed with costs.

*Judgment affirmed.*

## TERRITORY OF MONTANA, respondent, v. McANDREWS, appellant.

CASE AFFIRMED. The case of *Territory v. Stears*, 2 Mon. 325, as to sufficiency of indictment, affirmed.

APPEALS. Only such objections will be considered by the appellate court as were raised in the court below.

MURDER—*proof of premeditation*. Under the statutes of Montana it is not necessary to allege or prove premeditation when the facts show that the murder was committed for purposes of robbery.

INSTRUCTIONS TO JURY. The instructions given by the court should be based upon the facts appearing in evidence. Alleged errors in giving or refusing instructions will only be considered by the appellate court when evidence showing their applicability is properly embraced in the record.

EVIDENCE—*reasonable doubt*—*moral certainty*—*burden of proof*. Instructions on this subject given in the case of *Com. v. Webster*, 5 Cush. 320, considered and approved.

It is not error to refuse an instruction already given in substance.

Under the statutes of Montana, after the fact of killing is proved, the burden of proof is upon the accused to show circumstances of mitigation or justification.

*Appeal from First District, Jefferson County.*

THIS case was tried in the court below, before BLAKE, J.

E. W. TOOLE, and SHARP & NAPTON, for appellants.

1. The indictment does not charge facts sufficient to warrant a conviction of murder in the first degree, under our statute. 10 Ohio St. 459, 598. See *Rex v. Philips*, 6 East, 454; 8 Ohio St. 109, 124, and authorities cited; *id.* 307; 24 Wend. 518 *et seq.*

2. The court did not properly instruct the jury upon the subject of murder in the first and second degrees. See *People v. White*, 24 Wend. 518; *State v. Evans*, Mo. (1876); *State v. Turner*, 20 Wright (Ohio), 12, 53; *Commonwealth v. Dunn*, 8 P. F. Smith (Pa.), 9.

3. The instructions as to inferences of malice, intent, etc., from the killing, were inapplicable in this case. See *May v. Commonwealth*, 79 Penn. 316; 1 Greenl. Ev. 48; 6 Cush. (Mass.) 364; 5 *id.* 305; 13 Pick. 69-76; 38 Iowa, 59; 3 Gray, 463,

465-6; 3 Kans. 468; 2 Bish. on Crim. Pro., § 605; Whart. on Homicide (2d ed.), §§ 664-669; 5 Cent. Law Jour., No. 1, p. 12; 37 N. Y. 421-2.

4. The court should not have withdrawn, from the consideration of the jury, the offense of manslaughter, which was, like murder in the second degree, included in the indictment. In this, injury is presumed.

5. The court's instructions upon the subject of reasonable doubt were not as favorable to the defense as they should have been. 11 Nev. 343, 424, and authorities cited; 41 Tex. 561; 2 Metc. (Ky.) 33; 10 Minn. 416; 18 id. 208; *U. S. v. Babcock*, Dil. Cir. Court Rep.

6. Defendant's instructions were good law and should have been given. See 1 Nev. 31.

7. The court erred, after finding that a good cause for continuance was shown, in requiring defendant to go to trial upon admissions made by the prosecution. He was entitled to his continuance or testimony of his witness. *People v. Diaz*, 6 Cal. 249; 4 id. 198; 7 Cow. 383; 14 Johns. 341; 9 Ind. 340; 8 id. 114.

8. Injury is always to be presumed where error is shown. 38 Cal. 278; 42 id. 407.

SAMUEL WORD and J. G. SPRATT, district attorney, First District, for respondent.

The indictment in this case is good and the facts charged therein fully warrant the conviction of murder in the first degree. See *Territory v. Stears*, 2 Mon. 324; Cod. Sts. 273-4, §§ 18, 21; 39 Cal. 52; 34 id. 191.

The court has sufficiently instructed the jury in relation to murder in the first and second degrees. See transcript; instructions of court; Cod. Sts. 273, § 21.

In this case no exceptions have been served by defendant to the instructions of the court, in relation to murder in first and second degrees. See transcript; exceptions of defendant.

The instructions of the court upon the subject of malice, and inferences of malice, are not erroneous.

In the case at bar there was no evidence of facts or circumstances such as would, under the law, reduce the crime charged

to manslaughter, and there was no error in the court's omitting to charge the jury upon the subject of manslaughter. See 24 Cal. 17; 27 id. 507, 514; 6 id. 214; 30 id. 206.

In such case, where from the evidence the offense could not be reduced to manslaughter, any instructions given by the court in relation to manslaughter would be improper and calculated to mislead the jury. In this case no such instructions were asked by defendant and no exception taken for want of same.

The law as to reasonable doubt is correctly given by court below. See *Com. v. Costley*, 118 Mass. 24, 25; *Com. v. Webster*, 5 Cush. 295; *Com. v. Goodwin*, 14 Gray, 55; *Com. v. Tuttle*, 12 Cush. 502; *Com. v. Harman*, 4 Penn. St. 269, 274; *People v. Strong*, 30 Cal. 151.

The instructions as to reasonable doubt asked for by defendant do not differ in substance from instructions given by the court. See instructions; transcript.

It is no error or ground of exception that the court has refused to give instruction in language or form asked by defendant, if the substance of the instruction asked is given by court in other language. 118 Mass. 25, and authorities there cited; also see 30 Cal. 448.

The court committed no error in refusing a change of venue. Cod. Sts. 223, § 225; 44 Cal. 93.

Granting a continuance is discretionary with court. No error of court below in this particular. See statute; *Territory v. Perkins*, 2 Mon. 467.

The facts set up in affidavit of continuance, being admitted by the prosecution, the cause of continuance was removed. No injury has occurred to the defendant, for none of the facts thus set out and admitted under the statute are inconsistent with the guilt of defendant.

No error being shown by defendant, no injury to him is presumed.

WADE, C. J. This is an indictment for murder. The defendant, at the October term, 1877, of the Jefferson county district court, was tried and convicted of the crime of murder in the first degree, and sentenced to be hanged on the 25th of the present

month. There was a motion for a new trial which was overruled, and an appeal to this court.

1. The first assignment of error is, that the indictment is insufficient for that it does not properly charge the purpose and intent of the defendant in the commission of the alleged crime. The words used in the charging part of the indictment are the same as those in the indictment in the case of *The Territory v. Stears*, 2 Mon. 325, and as we are satisfied with our decision therein, reference is had thereto for the reasons that cause us now to uphold this indictment.

2. The effect of the next objection is, that as there was no testimony showing deliberation, premeditation and intention upon the part of the defendant to kill the deceased, therefore the court should have instructed the jury that at the utmost the defendant could have been convicted only of murder in the second degree. This objection cannot be raised here for the first time. It was not raised in the court below; there was no motion to set aside the judgment because the evidence did not support the verdict, and consequently the transcript does not contain all the evidence in the case. Even if we could now properly consider the verdict in relation to the evidence, sufficient testimony has been preserved in the record to strongly show that this murder was committed for the purpose of robbery, and in such a case, under our statute, it is not necessary to prove deliberation and premeditation.

3. The next question presented is, that as the defendant, under this indictment, might have been convicted of the crime of manslaughter, the court erred in withdrawing that crime from the consideration of the jury, and instructing that the defendant must either be convicted of murder in the first degree, murder in the second degree, or acquitted.

There is no evidence preserved in the record, tending in any manner to show that an instruction upon the subject of manslaughter would have been in any way applicable to the case. Here, again, the defendant was charged with the duty of having preserved in the record, testimony, if any such there was, showing that an instruction upon the subject of manslaughter would have been appropriate, before he can predicate error upon the refusal

to give such an instruction. Even if an instruction of this kind ought to have been given under the testimony, the defendant could not have been injured or prejudiced by its refusal, when from the testimony the jury found him guilty of murder in the first degree. Erroneous instructions, shown by the record not to be prejudicial, are not grounds for reversal. *Crocket v. State*, 18 Ohio St. 9.

The instructions to the jury must be applicable to the case; they must contain no abstract propositions of law outside of and wholly disconnected with the proof. A party cannot suggest an imaginary state of facts and then demand of the court to instruct the jury as to the law arising upon such imaginings, but the law as given by the court must naturally arise from, and be called forth by, the facts as they exist in the evidence. The action of the court below in giving or refusing instructions will not be reviewed unless the evidence, or sufficient of it, to show their applicability is properly embraced in the record. The authorities are numerous to support these propositions. See *State v. Millain*, 3 Nev. 410; *State v. Smith*, 10 id. 124; *People v. Turley*, 50 Cal. 470; *Hall v. Hunter*, 4 Green, 539; *Reid v. Mason*, 14 Iowa, 541; *State v. Hamilton*, 32 id. 272; *Myer v. Farish*, 11 B. Monr. 41; *McKinley v. Kenny*, 1 Mar. 460; *M. & C. R. R. Co. v. Picksley*, 24 Ohio St. 654.

4. The next objection, and the one to which greater weight attaches, is that the court erred in giving a certain instruction upon the subject of reasonable doubt, and in refusing one upon the same subject offered by the defendant. The instruction given, which was taken from the case of *Com. v. Costley*, 118 Mass. 1, and the case of *Com. v. Webster*, 5 Cush. 320, is as follows: "A reasonable doubt is not such a doubt as any man may start by questioning for the sake of a doubt; nor a doubt suggested or surmised without foundation in the facts or testimony. It is such a doubt only as, in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If so using the mind and considering all the evidence produced, it

leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by their verdict. It is possible always to question any conclusion derived from testimony, but such questioning is not what is a reasonable doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge."

The instruction offered upon behalf of the defendant, which was taken from the case of *The United States v. Babcock* (newspaper report), and refused by the court, is as follows: "The burden of proof is upon the prosecution in this case; it does not shift in criminal cases, but is upon the prosecution throughout, to establish the defendant's guilt by the evidence beyond a reasonable doubt, and it is the true policy of the law, rather than have an innocent man punished; that many criminals escape. You are not to find that the defendant is properly suspected, or that he is probably guilty, or that there is a preponderance of evidence against him, but before you bring in a verdict of guilty you must find, as a matter of fact, beyond all reasonable doubt, that the defendant committed the offense, and he only. It is always safer to err in acquitting than in convicting. The law clothes the defendant with the presumption of innocence which attends and protects him until it is overcome by testimony which proves his guilt beyond a reasonable doubt, which means that the evidence of his guilt must be clear, positive and abiding, fully satisfying the mind and conscience of the jury. It is not sufficient in criminal cases to justify a verdict of guilty that there may be strong suspicions or very strong probabilities of guilt, nor as in civil cases, a preponderance of evidence in favor of the truth of the charge against the defendant; but what the law requires is proof by legal and credible evidence of such a nature that when it is all considered by the jury, giving to it its natural effect, they feel, when they have weighed and considered it all, a clear, undoubting and entirely satisfactory conviction of the defendant's guilt. If thus proved the jury should convict, but if not, they should acquit."

No question is made in the arguments or in the briefs but what the instructions as given by the court sufficiently and properly informed the jury as to the burden of proof, and as to the presumption of innocence that always attends and protects a defendant, and we are called upon to determine whether the instruction as given contains a proper exposition of the law upon the subject of reasonable doubt, and whether the instruction offered by the defendant and refused by the court contained any thing in addition to the one given, that ought to have been given.

It is not error to refuse to give instructions asked for, however correct or applicable, if they have in substance already been given in the charge of the court. *Raven v. Webster*, 3 Iowa, 509; *State v. Hockenberry*, 11 id. 269; *State v. Sheeley*, 15 id. 404; *State v. Schlegel*, 19 id. 169; *State v. Stanley*, 33 id. 526; *Fitzgerald v. Jeralamon*, 10 Ind. 338; *Mussulman v. Pratt*, 44 id. 126; *Mayn v. Farish*, 11 B. Monr. 41; *Stewart v. State*, 1 Ohio St. 66; *Bend v. State*, 23 id. 349.

It was urged upon behalf of the defendant that the instruction as given reduced the standard of certainty required below what the law demands. In other words, that to authorize the jury to find the defendant guilty when so satisfied and certain of his guilt from the evidence as they would be satisfied and certain of the existence of any given fact, when judging of other matters of importance; whereas the law requires that degree of certainty, exercised and demanded when judging of matters of the very highest concern and the greatest importance. And the case of *State v. Rover*, 11 Nev. 343, and the authorities therein cited, and other authorities were relied on to show that the instruction as given was inherently defective in that it reduced the standard of certainty and degraded the character of evidence required. An analysis of the instruction will conclusively show that the claim of the defendant is not well founded, and will further demonstrate that the degree of certainty demanded and required in the instruction as given was of a higher grade, and of a more exalted character than is contained in the instruction offered and refused. The instruction as given by the court required the jury to make

a fair and reasonable effort to reach a conclusion from the evidence, and in making such effort to use their minds and judgments in the same manner as in matters of importance, and when so using the mind, when so judging of the facts before them, when thus careful of the conclusions to which they arrived, when their judgments were so satisfied as to their conclusions, then that they should go forward step by step, using their minds and judging of the facts as they would judge of other matters of importance, until they reached that abiding conviction known as a moral certainty of the truth of the charge, which is the very highest grade of certainty that human testimony can produce.

The phrase, "matters of importance," used in the instruction, does not refer to the degree of certainty that should characterize the truth of the charge contained in the indictment; but it does characterize the mode and manner in which the jurors should use their minds when reasoning upon, and judging of the facts while working their way through the testimony, and moving forward to the abiding conviction of moral certainty. What is meant by the phrase, "moral certainty"? In order to arrive at the true force and meaning of this instruction we must clearly understand the import of these words. Mr. Burrill, in his work on "Circumstantial Evidence," p. 199, says: "Moral certainty may be said to bear the same relation to matters relating to human conduct, that absolute certainty does to mathematical subjects. It is a state of impression produced by facts in which a reasonable mind feels a sort of coercion or necessity to act in accordance with it. The conclusion presented being one which cannot, morally speaking, be avoided consistently with adherence to truth."

The same author further says, p. 200: "It will be seen that in some of the definitions given, the nature of moral certainty has been explained by referring to common experience—the experience and action of any and every man of sound mind. And the test of its force in this point of view is a very practical one. It is not only what man in general will unhesitatingly *believe* to be true, but what they will be willing and ready to *act* upon. To practical men such as jurors usually are, this undoubtedly is the most

satisfactory mode of explanation, carrying a more vivid idea of the nature of the certainty in question than any formal definition in abstract terms, however carefully conceived and expressed. But to be thoroughly impressive it should be carried one step further. \* \* \* Is the juror so convinced by the evidence of the truth of the fact sought to be proved, that he himself would venture to act upon such conviction in matters of the highest concern and importance to his own interests? If this be so, he may declare himself morally certain." See, also, Starkie on Ev. 574.

And so the jurors were told by this instruction, that before they could find the defendant guilty, they must be so convinced of his guilt, from the evidence, that they themselves would venture to *act* upon such conviction in matters of the highest concern and greatest importance to their own interests. Greater certainty than this could hardly be conceived. The caution to the jury contained in the instruction refused, that it is better that many criminals escape than that one innocent man be punished, and that it is always safer to err in acquitting than in convicting, while calculated to put jurors on their guard, and to make them careful in their conclusions, does not approach the standard of moral certainty which requires them to act from the coercion of necessity, or to be guilty of perjury. The instruction refused, while it requires proof by legal and credible evidence of such a nature as to produce a clear, undoubting and entirely satisfactory conviction of the defendant's guilt, and is good law in this regard, yet it does not so clearly define the power of the conviction to be produced upon the minds of the jurors as does the instruction that was given to the jury. But the main objection to the refused instruction is found in this declaration:

"The burden of proof is upon the prosecution in this case; it does not shift in criminal cases, but is upon the prosecution throughout." This proposition is not correct under our statute. The statute provides that, the killing being proved, the burden of proving circumstances of mitigation or that justify or excuse the homicide will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime

committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide. And as the implication of malice arises in every case of intentional homicide, the fact of such homicide being proved, the burden then shifts to the defendant to reduce the grade of the crime or to show justification. It follows, therefore, that the instruction refused contained a false proposition of law under our statute, and for this reason alone the court was justified in refusing the same, though the balance of the instruction was correct.

The court also charged the jury upon the subject of circumstantial evidence, among other things: "That each fact necessary to the conclusion must be distinctly and independently proved by competent evidence beyond a reasonable doubt. All the facts must be consistent with each other, and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, and leading, on the whole, to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged. And when a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion."

The defendant asked the court to give the following instruction: "If the evidence in this case can be reconciled either with the theory of innocence or guilt, the law requires the jury to give the prisoner the benefit of the doubt, and to acquit." This instruction does not add any force, nor a single idea, to those given by the court, and the court is not called upon to repeat instructions already given in substance.

We have carefully examined the whole case and can find no error therein. The judgment is therefore affirmed.

*Judgment affirmed.*

## DEER LODGE COUNTY, appellant, v. AT, respondent.

CRIMINAL LAW — *recognizance in justice's court where no written complaint has been made is void.* A justice of the peace in open court verbally ordered the sheriff to arrest A. for two attempts to bribe him, and then verbally notified A. of the charges, but no complaint in writing was ever made. A. confessed his guilt and judgment was rendered that he be committed to jail to be held to appear at the following term of the district court, and his bail was fixed at \$5,000. A recognizance was executed and A. was discharged from custody. An indictment was found by the grand jury and A. failed to appear and his default and that of the sureties were entered, and this action was brought on the recognizance. *Held*, that the filing of a written complaint describing the offense of A. was necessary to give the justice's court jurisdiction to require the recognizance, and that the recognizance is void. *Held, also*, that the sureties as well as A., the principal, can plead the defense of duress and want of jurisdiction.

*Appeal from Second District, Deer Lodge County.*

THE judgment was rendered by KNOWLES, J., who tried the case without a jury.

A. E. MAYHEW, district attorney, second district, and SHARP & NAPTON, for appellants.

The recognizance is sufficient under our statute. Cr. Pr. Act, §§ 108, 257, 258; *Mendocino Co. v. Lamar*, 30 Cal. 627; *People v. Kane*, 4 Denio, 534; 1 Dill. on Mun. Corp. 276.

The court had jurisdiction over the person of the principal in the recognizance for the crime for which he was committed in the view of the court.

The plea of duress is personal and cannot be taken advantage of by the sureties on this recognizance. 1 Pars. on Cont. (6th ed.) 392-395, and cases there cited; *Baylie v. Clare*, 2 Brownl. 276; *McClintick v. Cummins*, 3 McLean, 158; Bac. Abr., Duress (B); Sedgwick's Stat. Law, 350.

A justice of the peace is a peace officer, recognized by the common law, the Organic Act and our statutes. When a crime is committed in his presence in open court, we see no reason why he cannot commit without further testimony. And if he does as

in this case, the defendant claiming no trial, the recognizance is good.

J. C. ROBINSON and CHUMASERO & CHADWICK, for respondent.

A written complaint in all criminal proceedings before a committing magistrate is necessary to give the court jurisdiction, and without it all proceedings are void. The rule is not changed where the offense is committed in the presence of the magistrate. In the latter case, a complaint must be filed for the magistrate to entertain any further jurisdiction. Cr. Pr. Act, §§ 70, 89, 114, 115; 1 Bish. Cr. Pr., §§ 179, 230; *Commonwealth v. Ward*, 4 Mass. 497; *Bridge v. Ford*, 4 id. 641; *Tracy v. Williams*, 4 Conn. 107.

The pleadings do not show a compliance with the statute in regard to waiving an examination. Cr. Pr. Act, § 111.

BLAKE, J. This is an action to recover the amount of a recognizance, which was executed and forfeited under the following circumstances. G. W. Irwin Esq., a justice of the peace in Deer Lodge county, was conducting the preliminary examination of Ung Hah, who had been arrested for committing the crime of murder. At two times during the proceedings Lee Sue offered money to the magistrate to procure the discharge of the prisoner. Irwin in open court verbally ordered the sheriff to arrest Sue and afterward notified him that he had been arrested for these attempts to bribe an officer, and that he was entitled to counsel. Sue did not demand any trial and made no defense and confessed his guilt. Irwin rendered judgment that Sue be committed to the jail to be held to appear at the following term of the district court to answer any charge which the grand jury might prefer against him. A commitment in proper form was made out and delivered to the sheriff and the amount of the bail was fixed at \$5,000. The recognizance, which is the subject of this action, was executed by the respondents and approved by the sheriff and Sue was released from custody. The grand jury at the regular term of the district court found and presented an indictment charging Sue with the commission of the crime of attempting to

bribe Irwin, while so acting as a justice of the peace. Sue never appeared and pleaded to the indictment, and his default and that of the sureties (all the respondents) were entered of record and the recognizance was adjudged forfeited. The recognizance has not been paid. At the trial in the court below, judgment was rendered for the respondents. No complaint in writing, charging Sue with violating any law of the Territory, was ever made before the finding of the indictment.

Our attention must be confined to one legal question. Did the omission to file a written complaint against Sue annul the recognizance? The statutes of the Territory require all prosecutions and criminal actions in the "justice of the peace courts" to be conducted or presented by complaint. Cr. Pr. Act, §§ 5, 468. The complaint must be subscribed and sworn to by the complainant, and must state the name of the person accused, the general name of the offense and the county in which and time when the same was committed. Cr. Pr. Act, § 76. The statute which authorized Irwin to command the officer by a verbal order to arrest Sue for committing a public offense in his presence, provides that the magistrate may "proceed as if the offender had been brought before him on a warrant of arrest." Cr. Pr. Act, § 70. A warrant of arrest is always issued after a written complaint has been made, and the appellant contends that this section empowered the magistrate to hold a preliminary examination of Sue without requiring any complaint against him to be subscribed and sworn to. This argument is refuted by many provisions of the Criminal Practice Act. "If the magistrate, upon examination of the testimony before him, finds that there is probable cause for believing the defendant guilty of the charge made against him in the complaint \* \* \* it shall be the duty of such magistrate to commit him to jail \* \* \* ." Cr. Pr. Act, § 96. After the examination, the magistrate "shall send to or file with the clerk of the court at which he has held the defendant to answer the complaint \* \* \* ." Cr. Pr. Act, § 110.

When a defendant waives a preliminary examination, the magistrate is required to "make a minute of such waiver, and make the same order as though he had found that there was

probable cause for believing the defendant guilty of the offense charged." Cr. Pr. Act, § 111. If the defendant is held to appear at the district court to answer the offense, the magistrate must "indorse on the complaint, or attach thereto," his orders relating to the bail which must be given by the defendant. Cr. Pr. Act, § 115. If the magistrate discharges the defendant, "he shall make the \* \* \* order on the complaint." Cr. Pr. Act, § 116. If we concede that Sue waived a preliminary examination (although it does not appear that the magistrate made a record of this fact), he never waived, if possible, his statutory right to have a proper complaint containing a description of the offense with which he had been charged. Sue was arrested legally, and Irwin, as a justice of the peace, could take jurisdiction and proceed to judgment without issuing a warrant of arrest. But a written complaint against Sue, setting out his offense, was as necessary in his case as in any other. 1 Bish. Cr. Pr., § 636; *Lancaster v. Lane*, 19 Ill. 242; *Tracy v. Williams*, 4 Conn. 107.

The statute provides that actions of this class shall not be barred or defeated "by reason of any neglect or omission to note or record" certain defaults, or any defect in the form of the recognizance, but it must appear that the magistrate was authorized by law to require and take the recognizance. Cr. Pr. Act, §§ 108, 257. In this action no neglect, omission or defect of this character has been pointed out by counsel, and we have referred to the only proceedings which have been criticised in the argument. We cannot presume any thing in favor of the jurisdiction of justices of the peace. Their jurisdiction is not general, but is limited by the laws of the United States and the Territory. The acts of Irwin, which have been mentioned, are not valid unless he has done what the legislative assembly has authorized in express terms or by necessary implication. Every section of the Criminal Practice Act which confers upon justices of the peace the power to require a recognizance of bail specifies the complaint which must be filed before the judgment can be entered. Irwin had no jurisdiction for this purpose until the proper complaint had been made, subscribed and sworn to. The recognizance was required and taken when the magistrate had no author-

ity to act, and is therefore void and cannot support this action. These propositions have been maintained by the courts which have investigated the question before us. *Bridge v. Ford*, 4 Mass. 641; *Vose v. Deane*, 7 id. 280; *Com. v. Loveridge*, 11 id. 337; *People v. Koeber*, 7 Hill, 39; *Williams v. Shelby*, 2 Oreg. 144; *Gachenheimer v. State*, 28 Ind. 91; *Solomon v. People*, 15 Ill. 291. The subsequent finding of the indictment against Sue could not aid the recognizance, which was not good at the time it was required or taken. *Griffin v. State*, 48 Ind. 258. This court has decided that the complaint to recover judgment on a recognizance of bail should allege the facts showing that the magistrate had jurisdiction to require or take the same. *Territory v. Hildebrand*, 2 Mon. 426. The facts that are admitted in the pleadings in the case at bar prove that the magistrate had no jurisdiction to require the recognizance.

The arrest of Sue, which was originally lawful, became illegal by the subsequent abuse of it by the magistrate and sheriff. A contract, which has been executed under compulsion or through the fear of unlawful imprisonment, can be avoided on account of duress. *Watkins v. Baird*, 6 Mass. 511; *Whitefield v. Longfellow*, 13 Me. 146; 1 Pars. on Cont. (5th ed.) 392, and cases there cited. The appellant insists that no party to this action, except Sue (the principal), can take advantage of the duress and that the sureties on the recognizance cannot plead this defense. The following authorities are relied upon to support this position. *Huscomb v. Standing*, Cro. Jac. 187; *Baylie v. Clare*, 2 Brownl. 276; *McClintick v. Cummins*, 3 McLean, 158. We are of the opinion that these cases are not applicable to the facts before us, and that they can be distinguished from that at bar. In *Harves v. Marchant*, 1 Curt. 136, the court held that a statutory bond for the liberties of the prison, executed by the debtor under duress, is void, both as to him and his sureties. We have decided that the recognizance is void for want of jurisdiction in the magistrate to require it. In *Waterloo T. R. Co. v. Cole*, 51 Cal. 386, Mr. Justice CROCKETT says: "It is too clear to require argument, that when the want of jurisdiction appears on the face of the proceedings, as in this case, any one injuriously affected may avail

himself of the defect, even in a collateral action." We think that the cases, holding that the sureties as well as the principal may avail themselves of the defense of duress, sustain the most reasonable legal proposition. *Fisher v. Shattuck*, 17 Pick. 252; *Osborn v. Robbins*, 36 N. Y. 365. The promise of the sureties to the recognizance was *nudum pactum*.

The judgment is affirmed.

*Judgment affirmed.*

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GALLATIN COUNTY, appellant, v. BEATTIE, respondent.

CONSTRUCTION OF REVENUE LAW—*mortgage—record*. A mortgage on real estate is only personal property, and under the Revenue Law of Montana (Codified Laws of 1871-2) can only be assessed in the county where found. The record of such mortgage in the recorder's office of a county, being only a copy of the original, is not taxable personal property.

*Appeal from First District, Gallatin County.*

THE action was tried by BLAKE, J., without a jury, and judgment was entered for Beattie.

J. G. SPRATT, district attorney, first district, for appellant.

SANDERS & CULLEN, for respondent.

KNOWLES, J. The complaint in this action charges that certain mortgages valued at \$1,900 were in the said county of Gallatin, Montana Territory, and were properly levied upon and assessed by the assessor of said county. The defendant in his answer denies that the said property is or ever was in Gallatin county, and alleges that the said assessor made up his assessment list, so far as this property is concerned, from the records of the county recorder of said Gallatin county, and avers that he never gave in said property to be listed for taxation, to said assessor. The replication to defendant's answer admits that the assessment was made on certain mortgages of record in the recorder's office for said county. It is also alleged in the answer and admitted in the replication that the defendant is a resident of Lewis and Clarke county.

There is nothing in the proof that tends to show that, at the time of the assessment of said taxes on said property, the said mortgages were in said county. This, under the pleadings, plaintiff was required to prove. The testimony shows that the assessment was made from the county recorder's books, wherein said mortgages had been recorded. The finding, number *three*, of the court below was in accordance with this testimony.

Section *seven* of the Revenue Law for this Territory (Codified Laws for 1871-2, page 603) provides: "All personal property shall be listed, assessed and taxed in the county where the same may be found, unless the owner or agent produce a receipt or certificate from the tax collector or assessor, showing that he has paid tax or been assessed for taxation on said property in some other county of the Territory for the same year."

Taking this section in connection with section *fourteen* of the same act, and I may add, the whole scope of the statute upon revenue, where it relates to the assessment of property, and it is evident that it was not intended to give the assessor of any county authority to assess property not in his county. To allow an assessor to assess any property but what he finds in his county would produce endless confusion in our revenue system and occasion much vexation and oppression. It will be seen by the section above cited that there is a limitation even upon the power of the assessor to assess all the personal property found in his county. If property has been listed and assessed in another county he is not to assess it. The reason of this limitation, undoubtedly, is because it may occur, and does frequently occur, that property which has been listed and assessed in one county may be removed therefrom to another county during the same fiscal year, and it would be unjust to make it contribute to governmental support in more than one county. But it does not follow that because an assessor cannot assess property in his county, upon which taxes have been paid in another county, although found there, that he can assess property in any other, although it may not have been assessed in the county where it is. For certain purposes counties are quasi-corporations, and for the purposes of supporting the corporate functions they exercise,

collect revenue. It would be an oppression to allow one corporation to assess the property of another corporation for the purpose of carrying forward its corporate enterprises.

A mortgage is a security for a debt. It retains no life when the debt is extinguished. It creates no estate in real property. *Mack v. Wetzlar*, 39 Cal. 247. The equity doctrine is that the mortgage is a mere security for the debt, and only a chattel interest. 4 Kent's Com. 174. In regard to mortgages we have followed the decisions of the courts of California, from which State we borrowed our statutes upon that subject. The rule established by the courts of that State upon this subject is the equity rule. A mortgage being a mere chattel like any other personal property is subject to taxation in the county where it is found. The record of a mortgage is not the mortgage itself, or any more than any other copy would be. The mortgages in this case, not having been found in the county of Gallatin during the fiscal year that they were listed and assessed there, the assessor had no right to list and assess them, for they were not subject to taxation in that county. The assessment of them was therefore void, and this action has no foundation to rest upon. The judgment of the court below is affirmed with costs.

*Judgment affirmed.*

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**ROUSH, respondent, v. FORT, appellant.**

**PRACTICE** — *service of amended complaint on attorney of record — taxation of costs.* This court reversed the first judgment in the action and remanded the cause for a new trial. A. filed March 15, 1876, an amended and supplemental complaint by leave of the court, and B. was ordered to plead thereto on or before March 18, 1876. No pleading was filed by B. until December, 1876, when he moved to strike the complaint from the files, because no copy had been served on him or his attorney. C. appeared in the original action and on the hearing of the first appeal as B.'s attorney and did not withdraw his appearance. By A.'s direction, the clerk of the court tendered a copy of said complaint to C., who refused to receive it on the ground that he had ceased to be B.'s attorney. The court allowed B. to answer to the merits upon the payment of certain costs. *Held*, that A. was authorized to serve said copy on C., as B.'s

attorney, and that the refusal of C. to accept it was a waiver of B.'s right to demand it. *Held, also*, that the court, in the absence of any excuse for B.'s delay, exercised its discretion properly in taxing the costs.

**PRACTICE** — *filing of amended complaint after decision of this court.* By the decision of this court on the first appeal, certain issues and the rights of two plaintiffs were finally determined. These issues and parties were omitted in the amended complaint, and the character of the action was thereby changed. *Held*, that it was necessary and proper for A. to file a supplemental complaint in conformity with the decision of this court.

**PRACTICE** — *hearing motion against rule of court — pleading judgment satisfied of record.* B. alleged in his answer that A. was indebted to him on account of a judgment for the foreclosure of a mortgage; that the mortgaged property had been sold by the sheriff, and the judgment was thereby satisfied; that the sale had been set aside by this court; that the amount secured by the mortgage was unpaid, and that A. was insolvent. B. prayed that this judgment might be set off against the claim of A. for the rents and profits of said property. On A.'s motion these allegations were struck from the answer. The court heard the motion on the day it was filed and the rules prohibited this action within twenty-four hours after such filing. *Held*, that B. should have resorted to the remedy, prescribed in the Civil Practice Act, to revive said judgment, and that the judgment, while it remained so satisfied, was not a subject of set-off or counter claim in this action. *Held, also*, that the determination of the motion within twenty-four hours after the filing thereof was an irregularity by which the substantial rights of B. were not prejudiced.

**JUDICIAL SALES** — *proceeds when void.* On the first appeal this court decided that B. had in his hands \$107.76, which should have been paid to A., if the sale of A.'s property under B.'s mortgage had been confirmed. Upon that hearing, A. maintained that the sale was void and this court so held. On the second trial, the court below affirmed the report of a referee finding that this sum with interest thereon was due from B. to A. *Held*, that A. was not entitled to any part of the proceeds of the sale in this action.

**TRUSTEE** — *liability for rents and profits.* Under an agreement between the parties, B. had the possession of the property mortgaged to him by A., during the six months following November 10, 1871, and was required to pay the rents and profits upon certain accounts. Under the order of the court, the referee found that B. should pay A. \$450, the value of the rents and profits during this time, which B. might or should have received as the occupant. The testimony did not show the amount that was paid to B. *Held*, that B.'s liability to A. was that of a trustee, and that he should have exercised an ordinary degree of care and diligence in the management of the property. *Held, also*, that this court cannot determine from the evidence the sum that B. received as such trustee.

**OCCUPANT OF REAL PROPERTY** — *liability for rents and profits.* B. deprived A. of the possession of said property by his fraudulent conduct from May 10, 1872, until February 5, 1876. *Held*, that B. was liable to A. as an occupant for the value of the rents and profits.

JUDGMENT SATISFIED — *payment*. On the trial, B. maintained that the court below could not divert the rents and profits of said property from the payment of the judgment, which appears in the record to have been satisfied. *Held*, that the court could not appropriate any sums arising therefrom upon the judgment.

*Appeal from Third District, Lewis and Clarke County.*

THIS action was before this court on another appeal. 2 Mon. 482. Isaac R. Alden, Esq., was appointed a referee to take the testimony and find the sums that were due to the parties. This report was confirmed by the court, WADE, C. J., and a judgment was entered against Fort.

WOOLFOLK & PORTER, for appellant.

No copy of the amended and supplemental complaint was served, as required by law, on Fort, or his attorney. Fort had no attorney and should have been served himself. Civ. Pr. Act, § 53; *People v. Rains*, 23 Cal. 128; *Willson v. Cleaveland*, 30 id. 192.

The court erred in compelling Fort to answer before he had been brought into court legally.

The amended complaint changes entirely the character of the action. The original action was brought against Fort, Stoner and Reece to set aside a sale. This action is against Fort alone and seeks to charge him for rents as a trustee. Such an amendment was not competent. Story's Eq. Pl. 884; 3 Estee's Pl. 296, § 7; *Chase v. Dunham*, 1 Paige, 572; *Bowen v. Idley*, 6 id. 46; *Pratt v. Bacon*, 10 Pick. 123; *Walden v. Bodley*, 14 Pet. 156; *Shields v. Barrow*, 17 How. 130; *Ramirez v. Murray*, 5 Cal. 222.

The court erred in taking up the motion of respondent to strike out parts of Fort's answer without waiting, under the rules of court, twenty-four hours before acting thereon.

Fort was entitled to have his original judgment revived in this action, after the sale under the judgment had been set aside. Equity would not remit him to another action for that purpose, when the matter could be adjusted in this action. Civ. Pr. Act, § 57; 1 Story's Eq. Jur., §§ 464-473; 2 id., §§ 1435, 1436; Story's Eq. Pl., §§ 366-373, 389-394; *Ord v. McKee*, 5 Cal.

515; *Waugenheim v. Graham*, 39 id. 169; *Rathbone v. Warren*, 10 Johns. 587; *King v. Baldwin*, 17 id. 384.

Under the agreement set forth in the complaint, the rents and profits sued for should be applied on said judgment.

Under the allegation of respondent's insolvency, Fort was entitled to set off his judgment against the rents he received as trustee. *Naglee v. Palmer*, 7 Cal. 547; *Walker v. Sedgwick*, 8 id. 398; *Russell v. Conway*, 11 id. 93; *Hobbs v. Duff*, 23 id. 625.

The court erred in directing the referee to charge Fort for the occupancy of the premises he purchased under his judgment.

Fort could not be charged with more than he received or might have received by using due diligence. *Perry on Trusts*, § 441; *Osgood v. Franklin*, 2 Johns. Ch. 1; *Franklin v. Osgood*, 14 Johns. 527. The complaint does not charge that Fort did not use due diligence to rent the property of respondent, or that he rented it for less than he might have received.

The only wrong of which respondent could complain was the issue of the execution, and the penalty of this action was the setting aside of the sale.

SANDERS & CULLEN, and CHUMASERO & CHADWICK, for respondent.

Fort was in default six months when he applied to have the default opened and to be let in to defend. The court granted the motion and required Fort to answer to the merits of the action. No default should be set aside except to permit a trial on the merits. *Macomber v. Mayor*, 17 Abb. Pr. 35. Defaults can only be opened in furtherance of justice and on terms. Civ. Pr. Act, § 76.

Fort obtained possession of respondent's property wrongfully. *Roush v. Fort*, 2 Mon. 482. Fort became a trustee by reason of his *mala fides* and chargeable with the value of the use of this property.

The record does not show that Fort was not served with a copy of the complaint as amended.

After the decision of this court in *Roush v. Fort*, *supra*, it was necessary to retain the bill to settle all matters growing out

of the transaction described in the original complaint, and the supplemental complaint was essential. *Cuff v. Dorland*, 57 N. Y. 262.

There was but one way for Fort to set aside the satisfaction of his judgment, and that is prescribed by the statute and was not followed. Civ. Pr. Act, § 286.

Fort was rightfully charged for his wrongful occupation of the premises as a trustee *de son tort*. Perry on Trusts, §§ 240, 245. He was accountable for what, with due diligence, he might have obtained for the rent of the property.

BLAKE, J. This is the second appeal that has been taken in this case, and it is not necessary to repeat the facts, which are stated in the opinion on the first appeal that has been reported. 2 Mon. 482. After this decision had been rendered, and the cause had been remanded to the court below for further proceedings, the respondents filed March 15, 1876, by leave of the court, their amended and supplemental complaint. This complaint was filed in open court and it was ordered that the appellant plead on or before March 18, 1876. No pleading was filed by the appellant, and the respondents moved for judgment December 7, 1876, and the court ordered that the appellant be permitted to answer to the merits upon the payment of all costs. At the hearing upon this motion, the appellant asked leave of the court to file a motion to strike this complaint from the files, because no copy had been served upon him or his attorney, and the amendments changed the parties to the action and the character thereof. The court refused to allow this motion to be filed and made no other order than that which has been mentioned. Afterward, the answer of Fort was filed, and the court sustained two motions by the respondents to strike out parts of the same, and refused to permit certain amendments to be made by the appellant. Afterward, the cause was referred and judgment was entered on the report of the referee in favor of the respondents for a certain sum of money.

The errors relied on by the appellant will be reviewed in the order in which they appear in the record. The appellant contends that the court acquired no jurisdiction over him until a

copy of the amended and supplemental complaint had been served on him or his attorney. He is correct in this position. The Civil Practice Act requires a copy of the amendments to be served upon the defendant, "or upon his attorney, if he has appeared by attorney. The defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases." Civ. Pr. Act, § 53. In the original action and on the hearing of the first appeal, E. W. Toole, Esq., appeared as an attorney of the appellant. The clerk of the court below was directed by the respondents to serve upon said Toole a copy of said amended complaint, but the latter refused to receive it on the ground that he had ceased to be an attorney in the action. It appears that the appellant removed from this Territory during the pendency of the cause and resided in the State of Missouri in 1876. Said Toole never withdrew his appearance as an attorney for Fort in said action, or notified the respondents or any other persons that his connection with the same had ceased, and no attorneys had been substituted in his place. While the name of said Toole remained on the record as the attorney of the appellant, he was the proper person on whom the service of said copy of the supplemental complaint could be made. When he refused to take the same from the clerk of the court, he waived his rights and those of the appellant thereto. We think that the respondents complied substantially with the Civil Practice Act by causing said copy to be served upon said Toole, after he appeared as the attorney of Fort, under the foregoing circumstances. In *Grant v. White*, 6 Cal. 55, judgment was rendered against White, who moved for a new trial, and employed, in the mean time, other attorneys. No substitution of attorneys was filed and no notice thereof was given to Grant. The attorneys for Grant served some papers on the attorney of record, who informed them that he was no longer in the case. The court held that this service was valid under the statute. In *Roussin v. Stewart*, 33 Cal. 208, the court holds that the service of a certain notice was properly made on persons who "appear by the record to have been the attorneys of the plaintiff in the court below."

It is claimed that the amendments to the complaint changed entirely the character of the action. If they had this effect, the authorities are uniform that courts will not permit them to be filed. *Pratt v. Bacon*, 10 Pick. 123; *Shields v. Barrow*, 17 How. (U. S.) 130; *Ayres v. Carver*, id. 591. The Civil Practice Act has adopted the following rule: "Where facts occurring subsequent to the commencement of the action render it proper, the same may be presented by supplemental pleadings and issue taken thereon in the same manner as in the case of original pleadings." Civ. Pr. Act, § 75. The reports contain many cases in which amendments have been made to the complaint under legal rules similar to this section. Upon an examination of the pleadings in this action, on which the first appeal was heard, it is evident that the judgment of this court, to the extent that it disposed finally of a number of issues which appear therein, made some amendments not only proper but necessary on the part of the respondents. The subject of controversy between the respondents and Reece and Stoner, two of the defendants in the original case, was determined finally by this court at the January term, 1876, in *Roush v. Fort*, *supra*. It was, therefore, proper that said Reece and Stoner should be retained no longer in the action, when their interests could not be affected in any manner by the judgment which might be entered.

It is also apparent that some of the matters relating to the appellant and the respondents remained undetermined, and the cause was remanded to the court below to secure a trial of the same. This court established the legal and equitable relations of Fort and the respondents, and afforded a partial relief to the respondents, and the respondents were compelled to amend their pleadings to obtain a full and complete remedy in conformity with the decision in *Roush v. Fort*, *supra*. Under such circumstances, it would be proper to present these facts, which had occurred since the commencement of the action. Pomeroy on Remedies, § 566, and cases there cited. In *Robinson v. Wilmoughby*, 67 N. C. 84, the action was brought to recover the possession of land under a deed which was absolute on its face. The court, on appeal, held that the deed was a mortgage, and reversed

the judgment of the court below and granted a new trial. Before the second trial, an amendment to the pleadings was permitted by the court changing the cause of action from its original form to one for the foreclosure of the mortgage. In *Baker v. Bartol*, 6 Cal. 483, it is held that it is no objection to a supplemental bill that it prays for a different relief from the original bill, and the court says: "It is true, that in some aspects the character of the case is altered by the supplemental bill, and so it must be in every case where an amended or supplemental bill is filed. Every additional and pertinent fact either enlarges or limits the right to relief, or affects the nature of it." *Buckley v. Buckley*, 12 Nev. 423; Story's Eq. Pl., ch. 8. We are satisfied that it was proper for the court below to allow the supplemental complaint to be filed, and the order requiring the appellant to plead within a certain time was essential under the Civil Practice Act. The substantial rights of Fort have not been affected by these amendments, and this court cannot reverse the judgment, if it appeared that an error had been committed in this respect. Civ. Pr. Act, § 79.

While the appellant was ordered to plead on or before March 18, 1876, no action was had in the cause until December 7, 1876, and the default of the appellant might have been entered at any time between these dates. No excuse was offered to the court for this delay, and there was no error in the order, which the court made in the exercise of its discretion, that Fort must answer to the merits and pay the costs. The circumstances that have been specified brought the parties within the seventy-sixth section of the Civil Practice Act, which authorizes the court, in furtherance of justice and on such terms as may be deemed proper, to enlarge the time for an answer.

After the appellant filed his answer, the court, on the motion of the respondents, struck therefrom a part which alleged that the respondents were indebted to the appellant in the sum of \$1,492.24, on account of the judgment rendered in the action in which the appellant foreclosed his mortgage upon the property of the respondents, and prayed that the same might be revived and set off against the claims of the respondents for rents and

profits. The court also refused to allow an amendment to be made to the answer, which embodied the same facts that had been passed upon in considering said motion to strike out, and contained an averment that the respondents were insolvent. The appellant insists that the court heard this motion in violation of the rules of the third judicial district, which allowed parties twenty-four hours to examine the same before a determination thereof. Conceding that the action of the court was irregular in this matter, the rule was directory merely, and the appellant does not show or claim that he was injured thereby. If the ruling of the court below was correct upon the question before it, it would be unjust for us to reverse the judgment by reason of the infraction of the rule prescribing the time for hearing the motion.

The appellant cites the authorities, which decide that parties will not be remitted to another action, when the matters in controversy can be adjusted in one that is pending, and declare the principles applicable to set-off and counter-claim. This court has announced similar doctrines. *Wells v. Clarkson*, 2 Mon. 230; *Boley v. Griswold*, id. 447. In the last case, we held that a party who had filed a motion to set aside the satisfaction of a judgment and revive the same had no standing in a court of equity until the court had acted thereon favorably; and that without this decision, he had no debt which could be a set-off. Under the proceedings in the action by Fort to foreclose the mortgage, the property of the respondent was sold by the sheriff, who made his return showing that the judgment had been satisfied. This court in *Roush v. Fort*, *supra*, set aside the sale of the property by the officer to the appellant, and the appellant contends that the satisfaction of the judgment, to the amount that it was affected by this decision, should be vacated and the judgment *pro tanto* be revived. These demands of the appellant are lawful, and this court would promptly satisfy them, if we had the power to do so. The Civil Practice Act protects in the most ample mode the rights of the appellant and points out clearly his remedy. He was empowered to file a petition setting forth the foregoing facts, and the court below was required to revive the

original judgment. Civ. Pr. Act, § 286. Although this remedy was full, complete and adequate, Fort could have commenced an action in the nature of an equitable proceeding, and obtained the same relief without any difficulty. *Cross v. Zane*, 47 Cal. 602\*. We think that the appellant should have acted diligently and resorted to one of these remedies, after the sale to him had been adjudged void; but he remained passive and refused to take any steps to protect his interests. When the subject was brought before the court below, the principles laid down in *Boley v. Griswold*, *supra*, were followed, and the respondents' motion to strike out and also disallow said amendment was properly sustained. Through the laches of the appellant, his claim against the respondents was not a proper subject of set-off or counter-claim at the time it was pleaded. This state of facts has not been changed since this appeal was taken, and, while we are desirous of granting relief to the appellant in this matter, he refuses to afford us the opportunity.

The referee was instructed to report upon certain issues. The judgment that is appealed from limits our inquiry into the action of the referee to the following items of the accounts between the parties. After the property of the respondents had been sold by the officer, under the execution obtained by the appellant, there remained in the hands of Fort \$107.76, which belonged to the respondents. *Roush v. Fort*, *supra*. If the sale had been confirmed by this court, the respondents would have been entitled to receive this amount. But the respondents appealed from the judgment of the court below, and procured a favorable decision of this court by which the sale was set aside on account of the fraudulent conduct of the appellant. Instead of ratifying the act of Fort, their trustee, which the respondents might have done, they waived their claim to the sum of \$107.76 and elected another remedy and must suffer the consequences. The amount of this sum, with the interest thereon from November 10, 1871, to June 30, 1877, \$168.51, was found by the referee to be due to the respondents and forms a part of the judgment entered in this

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\*This case was affirmed in *Scherr v. Himmelmann*, 53 Cal. 312.—B.

action. The respondents cannot recover this amount, and, at the same time, treat the sale by the sheriff as void and hold the appellant responsible for the rents and occupation of the property, to which it has been adjudged that the appellant had no valid title. The court below erred in finding that the appellant was indebted to the respondents in any sum by reason of this account.

Under the directions of the court, the referee found that the value of the use and occupation of the property, which was bought by the appellant at the sheriff's sale, from November 10, 1871, the date of the sale, to February 5, 1876, when the sale was set aside, was \$1,720. The officer delivered to the appellant November 10, 1871, a certificate of the sale, and, during the following six months, the respondents had the statutory right to redeem the property from the purchaser. Fort was not entitled to enter upon its possession, or receive the rents arising therefrom during this period. But under the agreement, which is referred to in *Roush v. Fort*, *supra*, the respondents made Fort their trustee and conferred upon him all the privileges of ownership of said property. What were the obligations of the appellant during this period? He should have exercised the same prudence, care and diligence in the management of the estate and collection of the rents thereof, as men of ordinary diligence, care and prudence manifest in their own matters. Perry on Trusts, §§ 441, 527; *Miller v. Proctor*, 20 Ohio St. 442. In the order of reference, the court below required the referee to charge the appellant with the value of the rents, issues and profits of this property, which he might or should have received as the occupant from November 10, 1871, to May 10, 1872 and judgment was rendered upon the findings of the referee for the sum of \$450, the value thereof. We have seen that the appellant was responsible to the respondents as their trustee, and not as an occupant of their property. What Fort might or should have received in these different relations affects to a great degree the amount which was found by the referee. The rule that was prescribed by the court was not authorized by law, and, as we cannot examine the testimony to determine the sum which should have been ascertained, we must strike from the judgment the sum of \$450.

The appellant deprived the respondents of the possession and enjoyment of their property from May 10, 1872, to February 5, 1876, by means of his fraudulent acts. *Roush v. Fort, supra*. What the respondents lost by the undue advantage taken by Fort must be made good, and the appellant must account for his misconduct, without regard to subsequent events of an accidental nature, which would have affected seriously the interests of the respondents. Bigelow on Fraud, § 512; *Kaye v. Powel*, 1 Ves. Jr. 408; *Fox v. Mackreth*, 2 Cox, 320. It was, therefore, proper to compel the appellant to account as an occupant of the premises from May 10, 1872, to February 5, 1876. During this time, the appellant sold a building, which was located on this property, and removed after the sale, and the court adjudged rightfully that the respondents were entitled to recover the value of the same, \$50.

The appellant maintains that the court below could not divert the rents of the premises from their application on the judgment, which was recovered in the original action by Fort against the respondents. We have passed upon this question, and reiterate that there is no judgment in existence in favor of the appellant and against the respondents, because the appellant refuses or neglects to resort to the appropriate remedy to revive the same. A court cannot be required to do an impossible act, and we know of no mode by which these sums can be applied in payment of a judgment, which appears in the transcript to have been fully satisfied. Before the supplemental complaint was filed, this court had determined that a judgment, that had been satisfied, could not be a set-off until it had been revived. *Boley v. Griswold, supra*. The appellant ignored this decision by attempting to file his amended answer, and asking the court below to apply said amounts in satisfaction of said judgment.

The judgment of the court below is modified by striking therefrom the sum of \$618.51, and in all other respects the judgment is affirmed.

*Judgment affirmed.*

## HAMMER, respondent, v. EDWARDS, appellant.

**PLEADING — replication — general or specific denial.** The Civil Practice Act of Montana, 1874, prescribes what an answer shall contain, but is silent as to replication. As to new matter contained in the answer the replication should follow the requisites of an answer, whether the denial should be general or specific.

*Appeal from Second District, Missoula County.*

W. J. STEPHENS, for appellant.

Judgment should have been for defendant. The denial in replication to new matter in answer should have been specific and not general. Before the adoption of the Civil Practice Act, February 13, 1874, a specific denial was required in all pleadings. The new Practice Act did not change the law as to replications, but only as to answers.

A. E. MAYHEW, for respondent.

WADE, C. J. This is an action upon a promissory note. The answer sets up new matter in avoidance, and the replication is a general denial thereto.

The only question raised by this appeal is as to whether or not the replication should have contained a general or specific denial to the new matter contained in the answer. The Civil Practice Act of 1874 is silent as to the form of the replication to new matter in the answer. The fifty-sixth section of the act provides: "That the answer of the defendant shall contain a general or specific denial of each allegation of the complaint intended to be controverted by the defendant." A replication to new matter is in effect, and must be treated as an answer, and in those cases where a general denial is sufficient in an answer under the Code, such denial in a replication is also proper and sufficient. The form of pleading required in an answer is sufficient in a replication.

Judgment affirmed with costs.

*Judgment affirmed.*

HAMMER, respondent, v. EDWARDS AND KENNEDY, appellants.

*Appeal from Second District, Missoula County.*

W. J. STEPHENS, for appellants.

A. E. MAYHEW, for respondent.

WADE, C. J. The only question involved in this case has been decided in the case of *Hammer v. Edwards and Latimer*.

The judgment below is affirmed with costs.

*Judgment affirmed.*

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ROUDEBUSH ET AL., respondents, v. RAY ET AL., appellants.

The only question raised in this case is fully considered in the case of *Higley v. Gilmer et al.*, decided at this term. See *ante*, page 90.

*Appeal from Third District, Lewis and Clarke County.*

CHUMASERO & CHADWICK, for appellants.

SHOBER & LOWRY, for respondents.

The briefs on both sides refer to authorities cited in the case of *Higley v. Gilmer et al.*, which see *ante*, page 90.

KNOWLES, J. The judgment in this case was rendered at an adjourned term of court. During the interval of adjournment a term of court was held in the same district in another county by the same judge. The only error assigned is, that this judgment was void because the term of court for Lewis and Clarke county terminated at the commencement of the term in Meagher county, and hence was not rendered in term time. This point has been considered in the case of *Higley v. Gilmer et al.*, at this term, and it was therein determined that such judgment was rendered in term time and valid.

The judgment of the court below is affirmed with costs.

*Judgment affirmed.*

## ERVIN ET AL., respondents, v. COLLIER, appellant.

**JUDGMENT** — *effect of reversing — district court to examine opinion.* When a judgment is reversed for an error occurring subsequent to the trial, the effect is to put the parties back to the stage of the case where the error occurred, but does not warrant a trial *de novo*. In such case the motions to amend, and try the case *de novo* were properly overruled. *Woolman v. Garinger*, 2 Mon. 405, cited and approved. The district court may examine the opinion of the supreme court to ascertain how to give proper effect to the judgment if reversed.

**EQUITY PROCEEDINGS** — *findings of chancellor — presumptions of law.* The finding of the chancellor, "That the equities of the cause are with the plaintiff," is equivalent to finding every material fact for plaintiff, and the same would be presumed from a judgment given for plaintiff unless the contrary appeared. *Morse v. Swan*, 2 Mon. 306; *Ming v. Truett*, 1 id. 322, cited and approved.

**LEGAL MAXIM APPLIED** — *end of litigation.* The maxim that there should be an end of litigation applies in this case, where the appellant has had one appeal and an opportunity to show cause for rejecting or reducing receiver's charges and has failed to do so.

*Appeal from First District, Jefferson County.*

THIS is the same case, reported in 2 Mon. 605, appealed again from judgment of court below, BLAKE, J., overruling motion to amend, answer and try the cause *de novo*, after the case had been reversed and remanded for error occurring subsequent to trial.

SHOBER & LOWRY, and SANDERS & CULLEN, for appellant.

Where errors occur subsequent to the finding of facts and a case is reversed on appeal, the court below may exercise its discretion to re-try the issues of fact or not, as upon investigation of the case, substantial justice will be promoted. This court upon the former appeal not having modified the judgment of the court below, nor having dictated what that court should have done, it was free to exercise judicial discretion on all questions, as if the case had not been tried. *Cuff v. Dorland*, 57 N. Y. 560; 3 *Estee's Pl.* 751-5; *Love v. Schartzner*, 31 Cal. 488; *Marquot v. Marquot*, 12 N. Y. 341; *Beach v. Cooke*, 28 id. 508; *Townsend v. Harwell*, 18 Ala. 301; 6 Cranch, 206; 25 Tex. 573.

The record of this case will show that there never was a finding of facts against appellants, and our offer to prove facts on the last trial was overruled.

CHUMASERO & CHADWICK, and E. W. TOOLE, for respondents.

The court below did exercise an appropriate discretion in holding that the judgment of reversal together with the accompanying opinion of the supreme court did not require a new trial. It is very questionable under our practice whether the errors alleged in this appeal furnish grounds therefor. If meritorious they would seem rather to justify a resort to mandamus.

If the court did not err in refusing to try the case *de novo*, the judgment in favor of respondents for receiver's fees was required by the finding of facts in their favor on the main issues.

KNOWLES, J. On the 23d day of February, 1874, the plaintiffs in the above-entitled action recovered a judgment awarding them a perpetual injunction, restraining the defendant from committing a threatened trespass upon certain property alleged to belong to plaintiffs.

In said judgment it was further adjudged that a report of a receiver who had been appointed pending the suit be confirmed, and that defendant should pay the costs of the receiver, including wages of the receiver, taxed at \$890.75. There was nothing in the record that showed us how much of this bill of costs was for wages, and how much was for expenses and charges. After the signing of this judgment, the defendant moved to modify the same, and on the fourth day of March following, the court did modify the same by striking therefrom all of the costs of the receiver.

From this modified judgment the plaintiffs appealed to this court, which for this error reversed said judgment and remanded the cause for reasons assigned in an opinion, which see 2 Mon. 605.

The cause came up again in the court below, and the defendant, instead of devoting himself to any errors that might be in the judgment of costs, made application to amend his answer and then try the cause *de novo*.

Both of these motions the court below refused and these refusals are assigned as error. In these particulars did the court err? They are the only questions presented for our consideration.

In the case of *Woolman v. Garringer*, 2 Mon. 405, this court made the following ruling: "In determining what force and effect is to be attached to a judgment of this court reversing the judgment of the court below we may examine the opinion of this court." And I may now add, for the same reason, that the district court may examine said opinion. For the purpose of informing the court below of the views of this court, the opinion in any case is attached to the remittitur thereof.

Again, in the case of *Woolman v. Garringer*, before mentioned, this court used the following language: "But we hold that where the error complained of occurs subsequent to the trial, and where a general verdict or a special verdict shows the facts found by a court or jury, and these are not controverted, and they are sufficient to warrant what we deem a correct judgment, and the opinion of the court clearly indicates what it would consider a correct judgment, then the judgment of this court to the effect that the judgment of the court below is reversed and cause remanded, should not be construed as granting a new trial, but as putting the parties back to the stage of the cause where the error occurred, for which the judgment was reversed."

There was no doubt as to where the error occurred in this case. It occurred in the judgment and not upon the trial. The question is then presented, whether or not sufficient was presented in the record of the case to warrant the court below in taking up the cause at the stage of the case where the error occurred. There had been a trial in the court below on all the issues of the case. The action sought equitable relief, the granting of an injunction. And in the decree or judgment reversed the court says: "This cause came on to be heard upon the pleadings on file, proofs and exhibits and report of the receiver herein, which is unexcepted to. Upon consideration whereof the court finds the equity of the cause with the plaintiff." The decree in pursuance of such finding is: "That the temporary injunction heretofore granted be made perpetual." I am inclined to think that the above find-

ing: "That the equities of the cause are with the plaintiff," should be construed as a finding of every material fact for the plaintiff. If that finding should not have this effect, then where a judgment is given, it will be presumed, unless the contrary appears, that the court that entered judgment found every material fact at issue in favor of the party for whom it gave judgment. *Morse v. Swan*, 2 Mon. 306; *Ming v. Truett*, 1 id. 322.

The court below then was confronted by this finding or the presumptions of law that all the facts were found that warranted the judgment. And it appeared that the only error, for which the judgment had been reversed, was the granting of the motion to modify the judgment. There was no need, therefore, for the court to go back to try the cause anew for the purpose of finding facts sufficient to warrant the judgment. The only question presented to the court below was the assessment of costs. The motion to modify the judgment came up anew for hearing. When that was determined, all of the facts necessary to advise the court as to what judgment it should enter were at hand. This is the view the court below took of the case. There was no error then in the court below refusing to allow the answer to be amended, and try the cause *de novo*. One trial on the merits was sufficient.

It is true that this court might have modified the judgment when the case was formerly before it, and ended it then. But if this court thought from the record that there might be found some reasons, which did not appear in the record before it for diminishing a rather large assessment of costs, and instead of modifying the judgment on the record presented, remanded the cause, it was a matter resting in its discretion. If the attorneys for defendant did not see fit to avail themselves of the opportunity presented, or no grounds existed for the reduction of the bill of costs in the case, then this court feels that its duty has been performed, and as there has been one trial of this cause on its merits, and no error now appears connected with that trial, the maxim that there should be an end of litigation applies. The judgment of the court below is affirmed with costs.

*Judgment affirmed.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1878.

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Present :

Hon. DECIUS S. WADE, CHIEF JUSTICE.  
Hon. HIRAM KNOWLES, } JUSTICES.  
Hon. HENRY N. BLAKE, }

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**Toombs, respondent, v. Hornbuckle, appellant.**

ACTION FOR DIVERSION OF WATER — *effect of Statute of Limitations and undertakings on appeals.* T. commenced this action July 16, 1875, to recover damages for the wrongful diversion of water by H. from April 21, 1870, until 1875. A judgment that T. was entitled to the use of the water had been entered April 21, 1870, in the court below, and H. appealed to this court and executed an undertaking to stay the execution of the judgment. This court affirmed the judgment and H. appealed to the supreme court of the United States, and executed another undertaking to stay the execution of this judgment. The judgment was reaffirmed and a remittitur was issued from this court to the court below, January 8, 1875. *Held*, that every continuance of the wrongful diversion of the water by H. was a new cause of action. *Held*, also, that, under the statute concerning limitations, T. could commence this action within three years after a cause of action accrued. *Held*, also, that

the undertakings on the appeals affected the subject of the original case, but did not restrict the right of T. to bring an action for the wrongful diversion of the water during the pendency of the appeals. *Held, also*, that T. cannot recover any damages on account of the water which was diverted by H. more than three years before July 16, 1875.

*Appeal from Third District, Meagher County.*

THIS action was tried before WADE, C. J., who refused the motion for a new trial.

CHUMASERO & CHADWICK, and SHOBER & LOWRY, for appellants.

The limitation of an action of trespass or waste in this Territory is two years. Cod. Sts. 516, § 8. The damages accruing during each year was a separate and distinct cause of action, and, after the expiration of each two years, a cause of action accruing during the preceding year was barred. Angell on Lim., § 300; Sedg. on Dam. 159; *Hart's Appeal*, 32 Conn. 520; *Baldwin v. Calkins*, 10 Wend. 167.

The appeal bonds given by appellants to enable them to test their right to the use of the water in controversy did not defeat or even suspend the right of respondent to use it. They did not prevent respondent from commencing an action against appellants whenever his right to the water was interfered with.

WOOLFOLK & PORTER, and E. W. TOOLE, for respondent.

Respondent could not sue for damages while the appeals of appellants were pending. The appellants suspended the operation of the decree giving respondent the water in dispute by their appeals and bonds staying proceedings; and respondent could neither sue for the possession of the water, or damages for its diversion, until such appeals had been determined. Respondent was not entitled to the possession of the water pending such appeals, and his right of action for damages depended on the right to the possession. Civ. Pr. Act, § 386.

The water belonged to appellants after the execution of the appeal bonds.

BLAKE, J. The respondent commenced this action July 16, 1875, to recover damages for the wrongful diversion of water by the appellants in the years 1870, 1871, 1872, 1873 and 1874. Evidence relating to the acts of the parties during these years was offered and submitted to the jury, and judgment was entered on the verdict for the respondent for \$3,000. A decree was entered in the district court April 21, 1870, for the respondent for the water in dispute. The appellants appealed therefrom to this court July 28, 1870, and executed the statutory undertaking to stay the execution of the judgment. The decree was affirmed by this court January 16, 1871, and the appellants appealed to the supreme court of the United States and executed another undertaking to stay the execution of the judgment. The decree was reaffirmed and the remittitur on the judgment was issued from this court to the court below January 8, 1875. The case is reported in 1 Mon. 286, and 18 Wall. 648. The complaint in this action alleges that the appellants have diverted said water since April 21, 1870.

We intend to consider only one question, the effect of the Statute of Limitations of the Territory upon the rights of the parties. The appellants maintain that the respondent cannot sue for any damages which were caused by their acts more than two years before the commencement of this action. The respondent contends that he could not institute this suit while the appeals were pending, and the proceedings upon the judgments were stayed by the undertakings or bonds. The act concerning "Limitations" provides that an action for waste or trespass upon real property, and an action for relief not otherwise provided for, shall be commenced within three years after the cause of action shall have accrued. Cod. Sts. 516, § 8; 517, § 9.

There is no clause in this act which restricts the right of the respondent to bring an action to redress the wrongs complained of during the pendency of the appeals in the original case. The appeals and undertakings affect the subject of that action, but cannot extend beyond it. When the appeal to this court was perfected, "all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced

therein," were stayed. Civ. Pr. Act, § 386. The same results followed the appeal to the supreme court of the United States. The sections that have been cited must receive a general construction, and courts cannot create any exceptions where the law-making power has made none. *M'Iver v. Ragan*, 2 Wheat. 25; *Demarest v. Wyncoop*, 3 Johns. Ch. 146; *Tynan v. Walker*, 35 Cal. 634, and cases there cited. The case at bar must be governed by the sections of the Statute of Limitations, *supra*.

It was formerly held that an injunction staying the commencement of an action did not suspend the running of the Statute of Limitations, or relieve a party from its operation. *Barker v. Mil-lard*, 16 Wend. 572. The court says: "No case was cited, nor have I met with any, where it was held that an injunction out of chancery would suspend the running of the statute." This wrong was remedied by the enactment of a law similar to that in force in this Territory, which is as follows: "When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action." Cod. Sts. 518, § 16; *Wilkinson v. First N. F. I. Co.*, 72 N. Y. 499. The statute provides further that "no person shall avail himself of a disability unless it existed at the time his right of action accrued." Cod. Sts. 518, § 17. There is no order of court, or provision of law, which prohibits the respondent from bringing an action to recover the damages for the wrongful diversion of the water at the times when his right so to do accrued. If there had been such an order, or statutory prohibition, the time during which the disability existed would not prevent the running of the Statute of Limitations, unless the legislative assembly excepted the same in express terms.

The law considers that the continuance of the wrongful diversion of the water by the appellants is a new cause of action, or a new nuisance. *Staple v. Spring*, 10 Mass. 72; *Baldwin v. Cal-kins*, 10 Wend. 167; Angell on Lim. (5th ed.), § 300. Successive actions may be brought so long as the appellants continue to divert the water. *Bare v. Hoffman*, 79 Penn. St. 71. In *Car-pentier v. Mitchell*, 29 Cal. 330, it appeared that the plaintiff was

entitled to the rents and profits of a tract of land, which had been the subject of controversy a number of years, and recovered a judgment for the same; but the supreme court disallowed the amount which was found due beyond the time limited for the commencement of the action. We are satisfied that the respondent cannot recover any other damages than those which were caused by the acts of the appellants within three years before the bringing of this action. The jury included in the assessment of damages the sum that was payable to the respondent for the diversion of the water in the years 1870, 1871 and 1872. We have no means of ascertaining this amount and cannot modify the judgment. The court erred in entering the judgment on the verdict and refusing to grant the motion for a new trial.

*Judgment reversed.*

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TERRITORY, FOR USE OF KENNA, BY ATTORNEYS, respondent,  
v. Cox, appellant.

ACTION AGAINST DELINQUENT EXECUTOR — *infant devisee*. Under the act of February 11, 1876, and section 280, page 366 of Codified Statutes of 1872, an action upon the bond of an executor by an infant devisee may properly be brought in the name of the Territory, to the use of the infant by his attorneys lawfully authorized.

PARTIES TO THE ACTION. Any person interested is authorized to bring such action upon the bond of a delinquent executor, nor does it need the intervention of an administrator *de bonis non*, a settlement and decree of distribution to authorize a devisee to maintain such an action, especially when it appears that such devisee is the only person interested.

STATUTE OF LIMITATION. Where letters of administration were revoked February 24, 1869, an action was begun in behalf of the infant devisee February 4, 1876; the same is within the time limited by statute. A change in the parties to the action by substitution of attorneys of record for guardian *ad litem* is not the commencement of a new action so that the original one became barred by the statute.

PLEADING. In pleading the judgment of a court of competent jurisdiction, it is sufficient to aver that the same was duly given or made, without setting forth the facts conferring jurisdiction.

*Appeal from First District, Madison County.*

THIS cause was tried in the court below by BLAKE, J., and the facts appear sufficiently in the opinion of the court.

CHUMASERO & CHADWICK, for appellants.

Complaint does not show that the necessary steps were taken to revoke the letters of administration. The averment "duly revoked" is insufficient. Cod. Sts. 321, § 35; 323, § 49; *Beach v. King*, 17 Wend. 197; 13 How. 413; 7 Barb. 206.

The proper foundation was never laid to begin the action. There should have been an administrator *de bonis non* appointed for the purpose of settling the accounts and making distribution. Cod. Sts. 323, §§ 45-9; 365, § 277; 319, § 18; *Willson v. Hernandez*, 5 Cal. 443; *Haynes v. Meeks*, 20 id. 308; Redf. on Sur. 347.

There could be no action by a legatee till distribution and a demand. 14 Mass. 431; 3 Pick. 219; 2 Blackf. 52.

There could be no action maintained by an infant without a guardian. Cod. Sts. 28, § 9; 364, §§ 268, 271; 24 How. 202.

The action was barred by Statute of Limitations. Cod. Sts. 323, § 48.

E. W. TOOLE and W. W. DIXON, for respondents.

The statute permits this action in the name of any party interested. The minor heir, M. J. Kenna, is alone interested. The statute further provides that the interested party may sue in the name of the Territory. Cod. Sts. 366, § 280.

If the interested person is a minor he may sue by his attorney. 9 Sess. Laws, 114, § 1.

No demand was necessary. *Halleck v. Moss*, 22 Cal. 266; *Harston's Pr.* 158.

Any defective allegations of material facts will be deemed cured by verdict and judgment. *Russell v. Mixer*, 42 Cal. 475; *Pom. on Rem.*, §§ 548-550; *Fabian v. Collins*, *post*, 215.

The only question here is, did a cause of action arise on account of the breach assigned, considering the same after verdict and

judgment. *Smith v. Holmes*, 19 N. Y. 271; 9 Cal. 268; 14 Pet. 44; 1 Mon. 333-4.

The Statute of Limitations runs from the date of the revocation of the letters of administration, and not from the time the cause of action accrued. Cod. Sts. 323, § 48.

WADE, C. J. This is an action upon the bond of an executor, prosecuted in the name of the Territory, to and for the use of a minor heir and devisee, by his attorneys. The questions presented by the appeal arise upon the complaint, and by the averments thereof it appears that on the 26th day of December, 1864, one Thomas M. Kenna, late of Madison county, departed this life, leaving a will in which the defendant Jacob B. Cox was named executor, which will was duly admitted to probate, and on the 12th day of January, 1865, Cox accepted the trust and qualified as executor, and gave bond as such, conditioned according to law, in the sum of \$5,000, with the defendants Clarke and Ewing as his sureties, whereupon letters testamentary were duly issued to such executor; that the executor received from the estate of the testator, soon after his appointment, the sum of \$7,747.74, and that he paid out for costs of administration and for debts due from the estate the sum of \$2,083.91, which included all costs and charges of administering said estate, and all debts due or to become due therefrom, and that he paid to Martin Joseph Kenna, a minor residing in the Dominion of Canada, to whose use the action is prosecuted, and is alleged to be the sole devisee of said testator, Thomas M. Kenna, and entitled to the whole of said estate after the payment of the debts thereof, the sum of \$500; that on the 24th day of February, 1869, the said letters testamentary were duly revoked, and that no administrator *de bonis non*, with the will annexed or otherwise, was thereafter appointed upon said estate; that Cox, during the time he acted as such executor, "did not faithfully and honestly execute the duties of his said trust according to law, for that he did misapply the assets and every part thereof of said estate (except the sum of \$2,583.91, paid as above stated), and did apply and appropriate the same to his own use and benefit; that is to say and the

plaintiffs charge, that in the month of March, 1867, after the execution of said bond, said executor then having in his possession assets of said estate amounting to the sum of \$6,423.45 in excess of all costs, charges and claims against the estate, and over and above all payments made by him, did so as aforesaid misapply and misappropriate said assets, and that said executor and the sureties upon his bond, and each of them, have wholly failed, neglected and refused to account for or pay over the assets of said estate so misappropriated and misapplied, but that such executor, since the month of March, 1867, has had and held to his own use, and does now so hold, all of the assets of said estate."

Upon these facts the defendants and appellants say :

1. That the action was not commenced by any party who could lawfully maintain the same.

2. That no breach of the bond has been alleged, first, because the allegation, that the letters testamentary "were duly revoked," is insufficient; and, second, because the facts stated show that the estate has not been fully administered and yet remains unsettled, and that before such breach could take place, an administrator *de bonis non*, with the will annexed, should have been appointed to demand and collect the assets of the estate and make final settlement and distribution thereof; and, third, because a devisee or distributee of an estate cannot maintain an action against an executor or administrator upon his bond until there has been a final accounting and a demand made for the legacy or distributive share; and, fourth, because if there had been a final settlement and order of distribution made, then this action should have been brought by the guardian duly appointed by the court in the county of Madison, the said Martin J. Kenna being an infant residing in a foreign country, which guardian alone would have authority to have demanded and received the legacy of his ward.

3. That the action was barred by the Statute of Limitations.

First. The complaint shows that all the expenses and charges of administration and all the debts owing by the testator had been fully paid and discharged by the executor before the revocation of his letters testamentary; that the only duty left unperformed by the executor was that of paying over the money in

his hands belonging to the estate to the person entitled to receive the same ; and that Martin J. Kenna, the only child of the testator, for whose use and benefit this action is prosecuted, is an infant and the sole heir and legatee of the testator, and therefore the only person interested in the estate.

The statute in force when this action was commenced provided, that "the bond of any executor or administrator may be sued on the instance of any person injured, in the name of the people of the Territory of Montana to the use of such party, for the waste or mismanagement of the estate or other breach of the condition of such bond." Cod. Sts. 366, § 280. See, also, p. 319, § 18, wherein the condition of the bond of an executor is recited, followed by the provision, "on which bond suit may be brought in the name of the People of the Territory of Montana by and to the use of any person injured by said executor in any court of said Territory having jurisdiction."

Martin J. Kenna being the only person interested in the estate and having the right under the statutes cited to bring an action on the bond of the executor in the name of the People of the Territory for the waste and mismanagement of the estate or for other breach of the conditions of the bond, but being a minor how should such action be instituted? The Practice Act in force on the 4th day of February, 1876, when the action was commenced, provided (§ 9) that "when an infant is a party, he shall appear by guardian who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a probate judge."

Accordingly the action was commenced in the name of the Territory to the use of the minor by his guardian *ad litem*.

But on the 11th day of February, 1876, the following statute for the relief of minor heirs became a law: "Section 1. That any minor heir or heirs, either resident or non-resident, of this Territory may commence and prosecute any suit or suits against any executor or administrator and sureties upon the bond of such executor or administrator, by attorney or next friend, and without the prepayment of costs or security therefor."

Afterward on the 28th day of March, 1876, the plaintiff filed

his motion and affidavit for the substitution of the attorneys of record of said Martin J. Kenna for I. C. Smith, his guardian *ad litem*, which motion was granted, and the plaintiffs thereupon filed their amended complaint, making such substitution; and under the act of February 11, 1876, and § 280, p. 366 of Cod. Sts. above cited, we think that an action upon the bond of an executor by an infant devisee is properly brought in the name of the Territory to the use of the infant, by his attorney lawfully authorized in the premises.

Second. The next proposition grows out of the first one, that this devisee, after the revocation of the letters testamentary, has not the right to institute this action in the manner designated or otherwise, and in effect is, that upon the revocation of the letters testamentary, an administrator *de bonis non* with the will annexed should have been appointed, whose duty it would have been to have commenced this action and collected the assets of the estate, and that not until such administrator had rendered his final account, and a distribution of the estate had been ordered, could the heir or devisee sue for his distributor's share or legacy, and that such suit in the case of a minor should be by guardian *ad litem*.

This proposition must fall with the foundation upon which it rests. Any one interested in an estate has the right at any time, either before or after an accounting, and whenever a breach of the bond of an executor or administrator occurs, to bring an action upon such bond. Cod. Sts. 366, § 280.

The statute further provides that if the letters of an executor be revoked, he or his sureties shall account for, pay and deliver to his successor all the property of the estate, and that such succeeding administrator may proceed at law against the delinquent and his sureties, or either of them, or any other person possessed of any part of the estate. Cod. Sts. 323, §§ 46-7. But this statute is not in conflict with section 280, above cited, nor does it deprive any one interested in the estate of the right at any time to commence an action upon the executor's bond to recover the estate whenever the same has been misapplied or misappropriated. This right exists with and belongs to any creditor, devisee or distribu-

tee of an estate. If a breach of the bond occurs either before or after the debts of the estate are paid, or before or after a final accounting and order of distribution, such creditor, devisee or heir may, by an action on the bond, protect and save the estate for those to whom it legally belongs.

The theory upon which an administrator *de bonis non* upon an estate is required, on the resignation or removal of an executor or administrator, is that the estate has not been fully administered; that there are assets to collect and debts to pay, but where, as in the present case, the executor, before the revocation of his letters testamentary, had collected all the assets of the estate and reduced the same to money, and had paid all the debts owing by the testator, and the expenses and charges of administration, and there was left in his hands a sum of money that belonged to the devisee of the will, which the executor had wrongfully converted to his own use, we see no reason why such devisee, in the manner authorized by statute, may not bring his action upon the executor's bond, to recover the money so wrongfully converted. Indeed the statute (§ 280) definitely and plainly gives this right, if a wrongful conversion of an estate by an executor to his own use is a breach of his bond, and of this there can be no doubt.

Nor do we think that where there has been a wrongful conversion to his own use of the property of an estate by an executor, a demand is necessary before bringing an action.

Even if an allegation of demand were necessary, the plaintiff seems to have attempted to make such allegation, but made it imperfectly, and the defendants failing by motion to require such averment to be made more certain and definite are deemed to have waived the objection thereto. The complaint avers, after charging that the executor misappropriated and converted the estate to his own use, that he and his sureties wholly failed, neglected and *refused* to account for and pay over the same. A *refusal* to pay presupposes a *demand* to pay. The averment is informal, imperfect and incomplete, but the right to object thereto is waived by failing to make the proper motion. On this subject Mr. Pomeroy says: "The true doctrine to be gathered from all the cases is, that if the substantial facts which consti-

tute a cause of action are stated in a complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete and defective, such insufficiency pertaining, however, to the form rather than to substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averment more definite and certain by amendment." Pomeroy's Remedies, § 549, and authorities cited. There being no motion of this kind and no objection to the introduction of evidence under the defective averment, we may, therefore, conclude that a demand was duly proved, though we hold the same not necessary in case of an unlawful conversion of property.

We therefore hold that the proposition advocated by appellants, that when an executor has collected all the assets of an estate and paid all the debts and expenses of administration, and has remaining in his hands a sum of money belonging to a devisee in the will, which money the executor wrongfully and fraudulently converts to his own use, and leaves the country, it is necessary in all cases to have appointed an administrator *de bonis non*, to collect the assets of the estate, so wrongfully converted, by bringing suit upon the executor's bond, and when collected, that an order of distribution be made before the devisee could take any steps to protect his interest in the estate, cannot be maintained.

Undoubtedly, it would be proper to have an administrator *de bonis non*, and to have him institute the action upon the executor's bond, but an action upon the bond is also given directly to the devisee, and where the estate has been fully settled, and there remains nothing to do but to hand over to the devisee his legacy, and he is the only one interested in the estate, it is useless to resort to the appointment of an administrator *de bonis non*. In such a case a devisee may sue upon the bond and recover his legacy. For the same reason, a creditor, before the debts of the estate have been paid, may bring an action thereon to recover the amount of the executor's default; and in such case, upon the revocation of the letters testamentary,

an administrator *de bonis non* would be appointed to receive the amount so recovered and administer the estate.

The applicants do not question the sufficiency of, or the form in which the breaches of the condition of the bond are assigned, and we therefore make no comment thereon further than to say that such general averments are probably good after verdict and judgment.

Third. The action was commenced on the 4th day of February, 1876. The letters testamentary were revoked on the 24th day of February, 1869. The action was not barred by the statute, which provides that: "All such suits against securities shall be commenced within seven years after the revocation or surrender of the letters or the death of the principal." Cod. Sts. 323, § 48. The cause of action existed in favor of this minor child and devisee on the 4th day of February, 1876, when the original complaint was filed, and the mere substitution, after the expiration of the seven years, of the attorneys of record of the beneficiary, for the guardian *ad litem* by whom the action was thereafter prosecuted in compliance with the statute, was not the commencement of a new action so that the same became barred by the statute. The change was a formal matter only, not affecting the cause of action or the person for whose use the same was prosecuted.

Fourth. The averment in the complaint that the letters testamentary granted to Jacob B. Cox were by the probate court of Madison county duly revoked, is attacked as insufficient, because it does not show that the necessary steps were taken to cause such letters to be revoked. The averment that the letters were "duly revoked" by a court of competent jurisdiction is sufficient under the sixty-seventh section of the Practice Act of 1872, under which the complaint was drawn, and which provides that in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.

The authorities cited by appellants are not applicable to a case arising under this statute.

The judgment is affirmed with costs.

*Judgment affirmed.*

## TERRITORY, respondent, v. HEXTER, appellant.

**VERDICT** — *separation of jury.* The separation of a jury in a criminal case, after having agreed upon a verdict, is not such misconduct as will set aside a verdict. To have this effect the court must be satisfied that the misconduct was such that it had or might have had an unfavorable effect upon the verdict.

*Appeal from Third District, Lewis and Clarke County.*

THIS cause was tried in the court below by WADE, C.J.

CHUMASERO & CHADWICK, for appellant.

This was a trial under an indictment for felony. The action of the jury in separating without leave of court before having rendered their verdict in court was in violation of section 315 of our Criminal Practice Act. See *State v. Parrant*, 16 Minn. 178, under similar statute.

The verdict rendered should be set aside as void. *People v. Kelly*, 46 Cal. 357; *People v. Backus*, 5 id. 275; *People v. Reagle*, 60 Barb. 527-546.

J. K. TOOLE, district attorney, for respondent.

The ground assigned would only be sufficient in case it could be shown that defendant was prejudiced thereby. The contrary appears affirmatively. See 2 Graham and Waterman on New Trials, 317; *People v. Lee*, 17 Cal. 76; *Same v. Bonney*, 19 id. 445; *Same v. Boggs*, 20 id. 432; *Same v. Jones*, 7 Nev. 413; *Same v. Harris*, 12 id. 421; *Same v. Cornelius*, 7 Eng. 782; *Same v. Mulkins*, 18 Kans. 16; 3 Park. Cr. 25.

KNOWLES, J. The defendant was tried and convicted of the crime of burglary. The jury after being duly charged by the court retired to their room in charge of a sworn officer. About five o'clock P. M. of the day that the cause was submitted to them, they agreed upon a verdict, sealed it up, and delivered it to the foreman, and then separated without any permission of the court or of the defendant, and remained separate until about nine o'clock A. M. of the next day, when they assembled and went

into the court-room and delivered the aforesaid verdict to the court as that of the jury.

The defendant assigns as error this misconduct on the part of the jury, which should set aside their verdict and reverse the judgment of the court below.

The general rule, as expressed in 1 Archbold's Pl. and Pr. 638, is this: "However improper the conduct of a jury may have been, yet if it does not appear that it was occasioned by the prevailing party or one in his behalf, or if it does not indicate any improper bias upon the juror's mind, and the court cannot see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside."

The above rule is fully sustained by authority. See Graham and Waterman on New Trials, 547-551, where a number of authorities are collected on this point.

The point here presented is then, under this rule can the court see that this misconduct of the jury either had or might have had an unfavorable effect upon their verdict as far as the defendant is concerned? The court below could not see that it had any such effect. Neither can this court perceive where such an effect did or might have occurred. The jury did not separate until they had agreed upon their verdict. How could their subsequent separation then have affected the verdict? The question suggests the conclusive answer, it could not. There is no reason in setting the verdict of a jury aside on account of the misconduct of the jury, when no one can see how in the least there is a possibility that the verdict was influenced by such conduct.

The counsel for defendant say in their brief that no case parallel with this can be found in the books. Had they consulted Graham and Waterman on New Trials, they would have found cases there collected similar to this, and would also have found that the rule deduced from all the cases upon this point by those authors is directly opposite to that claimed by them.

The cases of *People v. Kelly*, 46 Cal. 357, and *People v. Backus*, 5 id. 275, are not in point in this case. In those, the separation of the jury occurred before the finding of a verdict.

The aim of this court, while civil society in Montana is in its formative period, unless trammelled by some controlling precedent, should be to disregard all violations of mere matter of practice that it cannot see did or may have injuriously affected the substantial rights of a defendant in a criminal action.

It is true in this case that the jury and the officer in charge of them were guilty of misconduct, for which they were responsible to the court, but how the defendant was or may have been prejudiced by such misconduct I am unable to see.

The order of this court therefore is, that the judgment of the court below be affirmed with costs.

*Judgment affirmed.*

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CONKLIN, respondent, v. Fox, appellant.

PLEADING — *waiver of objection to joinder of defendants.* The complaint alleged that the defendants, A., B. and C. were copartners, and that the defendants were indebted to the plaintiff upon an account. The answer denied the allegations of the complaint, but did not plead that too many persons had been joined as defendants, and this fact does not appear in the complaint. The evidence proved that C. alone was indebted to the plaintiff, and judgment was entered against him. *Held*, that C. waived his objection to the number of persons who had been joined as defendants, by failing to plead the matter in his answer. *Held, also*, that the allegation of the copartnership could be treated as immaterial, and that the judgment was proper.

*Appeal from Third District, Lewis and Clarke County.*

THIS action was tried by WADE, C. J.

WOOLFOLK & BULLARD, for appellant.

Fox was charged as a member of a firm, and judgment was entered against him because he was not in the firm. The complaint was not amended. Where evidence establishes a different cause of action from the one complained of, it is a total failure of proof, and cannot be cured by amendment. The *allegata* and

*probata* must correspond. Code Civ. Pr., § 112; Nash on Pl. 330, 331; Harston's Pr., § 471; 2 Van Santv. on Pl. 824, 825; *Moore v. McKibbin*, 33 Barb. 246; *Chapman v. Carolin*, 3 Bosw. 456; *Hall v. Morrison*, id. 520; *Tomlinson v. Monroe*, 41 Cal. 94.

The evidence in the depositions that was not consistent with the complaint should have been struck out. *Boyce v. California S. Co.*, 25 Cal. 460.

The allegation of the partnership was material, and it devolved on respondent to prove it. Code Civ. Pr., §§ 108, 239; *Anable v. Conklin*, 25 N. Y. 470; *Smith v. Moynihan*, 44 Cal. 54.

This judgment is no bar to another action against appellant for the same case. 1 Smith's L. C. 647.

This was a case of a misjoinder of parties defendant. In California, under the same statute as ours, it is held that if parties are improperly sued jointly, and the issue is made as to the misjoinder, plaintiff cannot recover. Harston's Pr., § 578; *Rutenberg v. Main*, 47 Cal. 221; *South Fork v. Snow*, 49 id. 155.

This case was tried outside of the pleadings, and appellant could not be prepared, under the pleadings, to meet the evidence against him.

SANDERS & CULLEN, for respondent.

Under the Code, a several judgment is proper against appellant, the complaint alleging that he is jointly liable with other co-defendants. Code Civ. Pr., § 231; *Rowe v. Chandler*, 1 Cal. 168; *Lewis v. Clarkin*, 18 id. 400; *Kelly v. Bandini*, 50 id. 530; *Clafin v. Batterly*, 5 Duer, 327; *People v. Crain*, 8 How. Pr. 151.

There is no question of misjoinder in this case. The appellant has failed to raise it by his answer, if such a defense could be made available to him. Code Civ. Pr., § 86; Moak's Van Santv. Pl. 847; Pomeroy on Rem., §§ 289, 290; *Parchen v. Peck*, 2 Mon. 567; *Whitney v. Stark*, 8 Cal. 514; *Rutenberg v. Main*, 47 id. 221.

WOOLFOLK & BULLARD, for appellant, in reply.

A several judgment is proper when an action is brought upon

a joint liability or an apparent joint liability, which is not mentioned by respondent. To this extent only is the common law modified, that, in a joint action, recovery must be had against all or none of the defendants. But respondent did not sue upon an apparent joint liability. The evidence showed that appellant alone was liable, and respondent brought a false action against him.

Appellant pleaded the misjoinder of appellant with the other defendants, and took issue on the allegations of the complaint by denying them under the statute. Harston's Pr., § 437; Code Civ. Pr., §§ 87, 89. All the issues were raised by the denials of the answer, and the only one made was as to the partnership. No affirmative allegations were needed to raise the question of misjoinder more fully than the denials of the answer. Code Civ. Pr., § 239.

BLAKE, J. The respondents bring this action on an account for goods sold and delivered to three persons, who are described in one part of the complaint as copartners. The summons was served upon Fox, one of the defendants, and judgment was entered against him alone. The complaint alleges that "said defendants are indebted to these plaintiffs in the sum of \* \* \* upon an account for goods \* \* \* sold and delivered to said defendants by these plaintiffs at their special instance and request." \* \* \* The separate answer of Fox denies the allegations of the complaint, and denies also that he is indebted on his individual account, or in any manner, to the respondents.

The errors which are complained of can be determined by the consideration of one question — Can this judgment be entered against the appellant under the pleadings? The complaint alleges that the defendants are copartners, but it does not state that they are indebted as such copartners to the respondents. The evidence supports the judgment. There is no controversy respecting this branch of the case. Under the Code of Civil Procedure of this Territory, "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." § 231. "In an action against

several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper." Code Civ. Pr., § 232. We are satisfied that we may treat as immaterial the allegations of the complaint concerning the copartnership, and that a cause of action is stated against the defendants. The proof showed that too many persons had been joined as defendants, but this fact does not appear upon the face of the complaint, and the answer of the appellant did not plead it. The appellant thereby waived his objection to the misjoinder of the parties defendant. "If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." Code Civ. Pr., § 86, *Parchen v. Peck*, 2 Mon. 567.

The action of the court in entering the judgment is sustained by the following authorities: *Pomeroy on Rem.*, §§ 289, 290; *Rowe v. Chandler*, 1 Cal. 168; *Rutenberg v. Main*, 47 id. 213; *Clafin v. Batterly*, 5 Duer, 327. In *McIntosh v. Ensign*, 28 N. Y. 169, Mr. Justice WRIGHT says: "A plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved, had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown." The sections of the Code of Civil Procedure, *supra*, embody the principle which is maintained by these authorities. The allegations of the pleadings have been liberally construed, and substantial justice has been done between the parties. Code Civ. Pr., § 98.

*Judgment affirmed.*

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CURTIS, respondent, v. DONNELL ET AL., appellants.

APPEAL — effect of. The operation of a judgment and decree is not suspended by an appeal to the supreme court of the United States, where there is no *supersedeas* or stay of execution so that it may not be set up as a bar to a retrial of the same issues between the same parties. The judgments bind the parties as to every question directly decided.

*Appeal from Second District, Deer Lodge County.*

THIS cause was tried in the court below by KNOWLES, J.

SHARP & NAPTON, for appellants.

The former judgment in the foreclosure suit was no bar to this action. 2 Pars. on Cont. (6th ed.) 730, note *p*; *King v. Chase*, 15 N. H. 9; *S. S. R. R. Co. v. Daniels*, 20 Gratt. (Va.); 99 Mass. 200.

The plaintiff allowed evidence of fraud, without objection, and thus waived the bar of the judgment. *Megerle v. Ashe*, 33 Cal. 74.

W. W. DIXON, for respondent.

The findings and decree in the case of *Curtis v. Heath* were a bar and estoppel as to the question of fraud in this action. Freeman on Judgments, § 328; *Taylor v. Shew*, 39 Cal. 538; 8 Nev. 35; 16 Ind. 107; 13 Abb. Pr. (N. Y.) 369; 13 Mo. 87.

The property in dispute was the same, the issues raised and determined were the same, and the judgment binding on all parties thereto. Bigelow on Estoppel, 125-6.

The estoppel was properly pleaded in the replication. Respondent could not object to appellants' evidence of fraud, for the estoppel could not then be introduced.

If appellants wished to show error below they should have asked a finding on the question of fraud.

WADE, C. J. This is an action prosecuted by the plaintiff to recover of the defendants the value of certain personal property, consisting of horses, colts, cows and other cattle which were seized by defendants, and sold under an execution, issued upon a judgment in their favor against one Archibald Heath. The defendants in their answer among other things allege that the plaintiff claimed the right to the possession of the property in question by virtue of a certain mortgage executed and delivered by the said Archibald Heath to the plaintiff to secure the payment of a certain note of the former to the latter, which note they charge was without consideration, and that the mortgage was executed and

delivered to the plaintiff to conceal said property from the creditors of Heath, and to hinder, delay and defraud them in the collection of their demands.

Wherefore they ask that the note and mortgage be declared fraudulent, and that Heath be adjudged the owner of said property at the time of the seizure and sale thereof upon their judgment and execution against him.

The replication among other things alleges that on the 15th day of January, 1877, the plaintiff commenced action in the district court of the second district to foreclose the mortgage mentioned in the defendants' answer herein, upon the property in controversy in this action; that in said action this plaintiff was plaintiff and these defendants and others were defendants; that said court had full and complete jurisdiction of all said parties to the action and the subject-matter thereof, and the matters and rights therein determined; that the defendants herein, who were defendants in that action, with others, appeared and filed their separate answers to said complaint, and that in each of said answers, defendants averred and charged that the plaintiff's mortgage from Heath was without consideration, fraudulent and void, and prayed that the same be so declared as against them, and charged and averred the same matters and things as against the mortgage as are contained in the answer of the defendants herein; that thereafter the plaintiff filed her replication to such answer, denying and taking issue upon said charges; that upon the 26th day of April, 1877, this issue was tried in said court and found in favor of the plaintiff, and that the mortgage was not without consideration, and was not fraudulent or void as against these and the other defendants to said action. Whereupon the court duly rendered judgment in favor of the plaintiff and against these and the other defendants therein upon said issues, and its decree in favor of the plaintiff and against these and the other defendants for a foreclosure of the said mortgage and a sale of the mortgaged property to pay the amount found due the plaintiff and costs, which said judgment and decree were duly entered and made of record, and are now in full force and wholly unsatisfied, and that the matters and issues tried and decided in that action are the

same as those set up by these defendants for a defense to this action.

These allegations of the replication were not controverted by the defendants, but it appeared in evidence that from the judgment and decree in the foreclosure case, an appeal, without stay of execution, had been taken to the supreme court of the Territory, where the judgment and decree of the district court was affirmed, from the affirmation of which, by the supreme court of the Territory, an appeal without *supersedeas* or stay of execution had been taken by these defendants to the supreme court of the United States, where the case was pending at the time the present action was tried in the district court.

Upon such trial the court found as matters of fact, in substance, that the averments of the replication were true, and as matter of law arising thereon, that the judgment and decree, and the trial and proceedings in the foreclosure action are a bar to the retrial of the same issues in this action, and that defendants are estopped thereby to question the validity of said mortgage and to retry the issues made in their answer herein as to said mortgage.

Was this finding correct? The proposition does not seem to be controverted that the judgment and decree in the foreclosure action is a bar to the retrial of the same issues between the same parties in this action unless by virtue of the appeal of that case to the supreme court of the United States, without *supersedeas* or stay of execution, the operation of the judgment and decree is suspended so that it may not be set up as a bar.

In the case of *Fredericks & Fredericks v. Clark & Davis*, we have at this term passed directly upon this question, holding the following language: "But we do not think that an appeal may be considered as suspending the operation of a judgment so that it is not admissible as evidence in any controversy between the same parties. Until reversed or annulled, the judgment is binding upon the parties as to every question directly decided."

The authorities cited in that case fully sustain this doctrine, and of course if the judgment binds the parties as to every question directly decided, it ought to be a bar to a retrial of the same questions in another case. The case of *King v. Chase*, 15 N.

H. 9, referred to by appellants, was an action of trover in which a deed was offered in evidence to establish the title of the plaintiff, and impeached by the other party as fraudulent, and there was a verdict and judgment for the defendant. It was held that such verdict and judgment would not conclude the plaintiff in another suit for the recovery of other property included in the same conveyance. That case is not in point here, for in this action the defendants seek to retry the question as to the fraudulent character of the mortgage and assert their right to the same property that they claimed in the foreclosure action.

The following additional authorities support the views expressed in this decision. *Taylor v. Shew*, 39 Cal. 538; *Rogers v. Hatch*, 8 Nev. 35; *Neel v. Constant*, 16 Ind. 107, and authorities cited; *Tyler v. Wills*, 13 Abb. Pr. (N. Y.) 369; *Heedelenzer v. Hughes*, 13 Mo. 87.

*Judgment affirmed with costs.*

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FABIAN, respondent, v. COLLINS, appellant.

DIVERSION OF WATER — *complaint in action for equitable relief.* The complaint alleged that A. and his grantors on and before April 19, 1876, were the owners of a ditch that conveyed the water of Silver creek in Ottawa gulch upon their placer mines in Jenny's basin; that they had a prior right to the use of the water through said ditch; that, while A. was in the peaceful possession of the water, B. wrongfully diverted the same from the ditch; that B. had diverted the water since April 19, 1876, and threatened to continue such diversion; that A. would thereby be wholly deprived of the use of the water, and great and irreparable injury would result to A., unless B. was enjoined from diverting the same. *Held*, that the complaint states a cause of action, and that A. is entitled to equitable relief against B.

CASES AFFIRMED. The complaints in the cases of *Caruthers v. Pemberton*, 1 Mon. 111; *Harris v. Shontz*, id. 212; *Toombs v. Hornbuckle*, id. 286; *Columbia M. Co. v. Holter*, id. 296; *Gallagher v. Basey*, id. 457, and *Barkley v. Tieleke*, 2 id. 59, commented on and their sufficiency affirmed.

JURY TRIAL IN ACTION FOR DIVERTING WATER. Upon the trial of this action, B. demanded a trial of all the issues by a jury and a general verdict, but the court submitted to the jury a number of special findings and based upon them its judgment. *Held*, that this was a case in equity, and that B. was not entitled to a trial by jury.

WATER RIGHT — *verbal license — appropriation of water by possession of*

*ditch.* The grantors of A. entered into a verbal agreement with B., under which they had the privilege of using said water upon their mines in said basin, but were required, upon the demand of B., to permit the water to flow down said gulch to the mining ground of B. Afterward, in 1867, they dug said ditch and used the water until 1872, when they sold and delivered to A. their mines, ditch and water-right. A. used the water in said ditch until April, 1876, when B. demanded the same, and diverted it upon the refusal of A. to deliver the same, and A. then commenced this action. The agreement was never reduced to writing and A. had no notice thereof. *Held*, that B. had a prior right to the use of the water, and that the appropriation by A. must date from 1872, when he took possession of said ditch. *Held, also*, that the agreement was a personal license from B. to the grantors of A., that B. could revoke the same at any time, and that said grantors could not sell and convey any right in the water to A.

*SAME — pleading equitable estoppel in replication.* The answer of B. set forth said agreement, and the replication of A. alleged that B. was estopped from pleading the same, because he was present when A. purchased of said grantors the ditch, water-right and mines, and did not notify A. of the existence of the agreement. B. did not demur to the replication, and upon the trial all the facts relating to the agreement were offered in evidence by both parties. *Held*, that the replication does not allege the facts constituting an equitable estoppel, because it does not appear that A. was influenced in buying said ditch and water-right by the conduct of B., and that A. then had no convenient means of acquiring knowledge of the true state of the title thereto. *Held, also*, that B. waived his objections to this defective allegation of the replication by taking no exception to the same and allowing the introduction of evidence thereon as fully as if the facts had been properly pleaded.

*PRACTICE — implied findings.* The judgment recites that the equities of the case are in favor of A. and there is no finding upon the issue of the estoppel. *Held*, that this action is governed by the Civil Practice Act, approved January 12, 1872, and that this court must presume that the court below found on this issue for A.

*WATER-RIGHT — estoppel of witness and draftsman of deed conveying water.* A. purchased said mines in said basin in 1872. The deed was prepared by B., who also witnessed its execution, and described the property "with the water-right and ditches and other appurtenances thereunto belonging to the aforesaid mining ground." B. knew that the mines could not be worked successfully without the use of this water, and the parties talked with B. about the contents of the deed. B. knew further that the ditch and water-right were embraced in the sale and description in the deed, and did not inform A. of the claim of any person to the water. *Held*, that B. is estopped from asserting a right to the water adverse to A., and that B. should have notified A. of his claim to the water before the execution of the deed.

*Appeal from Third District, Lewis and Clarke County.*

THE action was tried before WADE, C. J.

SHOBER & LOWRY, and E. W. TOOLE, for appellant.

This is an action in equity. Appellants were in possession of the water when the action was commenced, and this should have been an action in the nature of ejectment. Equity will not interfere except in aid of such an action. Civ. Pr. Act, title Injunction; *Raffetto v. Fiori*, 50 Cal. 363; *Felton v. Justice*, 51 id. 529; *Lewis v. Cocks*, 23 Wall. 466.

This action, having been improperly brought, should be dismissed. The title to a water-right is measured by the same law as is applicable to land. The complaint is defective in failing to state that respondents are the owners of any particular water-right, and attempts to deraign title by alleging the building of a ditch to convey water for the special purpose of mining a certain piece of ground in Jenny's basin. The title is not deraigned from any person having a right to the water. Where an attempt is made to plead deraignment of title every fact must be averred to show a complete title against defendant where the pleading sets up title in plaintiff. *Castro v. Richardson*, 18 Cal. 478; *Rumsey v. Redell*, 9 Minn. 34.

The complaint does not set up facts which entitle respondents to take all the water and sell it. Only a special use is claimed by respondents. *Smith v. O'Hara*, 43 Cal. 371; *Fabian v. Collins*, 2 Mon. 515.

The answer has a complete defense to the action. Respondents' grantors had a license from appellants to use the water, and cannot claim a better title than those who constructed the ditch. Tyler on Ejectment, 879-80; *Irvine v. Adler*, 44 Cal. 559; *Luce v. Carley*, 24 Wend. 451; *Babcock v. Utter*, 32 How. Pr. 439; *Eggleston v. N. Y. & H. R. R. Co.*, 35 Barb. 162; *Le Fevre v. Le Fevre*, 4 S. & R. 241; *Hepburn v. McDowell*, 17 id. 383.

Appellants were the first appropriators of the water, and respondents cannot upon the facts claim that they own the water because their grantors built the ditch. The verbal license did not divest appellants of any title, and they could retake the water at pleasure. Equity will not interfere to take away a legal right from a party. 1 Story's Eq. Jur. 5; *Clinton v. Myers*, 46 N. Y. 511.

The only question for trial was the ownership of the water-right, and the court should not permit this to be litigated in an action for an injunction.

The replication fails to plead an estoppel and there are no findings on the subject. No fraud of appellants is shown. The deeds do not convey any particular ditches or water-rights. To constitute an estoppel, some fraud must be practiced. All the facts constituting an estoppel must be fully set out in the replication, or it is worthless as a defense. *Kinder v. Macy*, 7 Cal. 206; *Meeker v. Harris*, 19 id. 288; *McCauley v. Fulton*, 44 id. 355; *Tormey v. True*, 45 id. 105; *Brant v. Va. C. & I. Co.*, 93 U. S. 326.

The recital in the judgment is not a finding under the Code. Unless the findings support the judgment, it must fall. *Campbell v. Buckman*, 49 Cal. 362; *N. P. R. Co. v. Reynolds*, 50 id. 90; *Harris v. Burns*, 51 id. 528.

WOOLFOLK & PORTER, and SANDERS & CULLEN, for respondents.

This is a proper action. Ejectment would not be an adequate remedy. There was no interference with the ditch, but the water, which was an incident to the ditch. To prevent the diversion of the water, an injunction was the appropriate remedy. *Harris v. Shontz*, 1 Mon. 212; *Barkley v. Tieleke*, 2 id. 59; *Tuolumne W. Co. v. Chapman*, 8 Cal. 392; *Sherman v. Clark*, 4 Nev. 138; *Fabian v. Collins*, 2 Mon. 510; Civ. Pr. Act, § 129; *Blanchard and Weeks on Mines*, 749, 750.

There was no attempt to deraign title in the complaint.

The digging of the ditch under a parol license is no defense to this action. Appellants had not appropriated the water, and were mining several thousand feet below the point where respondents' ditch returns the water to Ottawa gulch, when the license was given. Appellants had the prior right to use the water where they were mining, but respondents' grantors could go above and use the water as they did, without asking appellants therefor. *Butte C. & D. Co. v. Vaughn*, 11 Cal. 143; *Blanchard and Weeks on Mines*, 745; Bouv. L. D., "License."

The parol agreement could not affect respondents, who had no notice of its existence. 2 Am. L. C. 507 *et seq.* The authorities cited by appellants are cases where the circumstances gave notice, or no injury had resulted from want of notice.

A ditch is real estate, and appellants could not, by a parol agreement concerning the ditch, acquire any rights against appellants, who bought the ditch in good faith and without notice of the agreement. *Reed v. Spicer*, 27 Cal. 57; *Smith v. O'Hara*, 43 id. 371; *Barkley v. Tieleke*, *supra*; Cod. Sts. 400, §§ 23-25; 402, § 34; 393, § 6; *Nelson v. O'Neal*, 1 Mon. 284; *Columbia M. Co. v. Holter*, id. 296.

Appellants are estopped by their conduct from pleading the license. They were present when the deeds were made and witnessed them, and gave no notice of their claim. *Godeffroy v. Caldwell*, 2 Cal. 489; *Parke v. Kilham*, 8 id. 77; *Bryan v. Ramirez*, id. 461.

Estoppel was sufficiently plead, but if imperfectly plead, the objection comes too late after judgment. *Hentsch v. Porter*, 10 Cal. 555; *Hallock v. Jaudin*, 34 id. 167.

BLAKE, J. The report of the appeal in this case from the order of the judge dissolving a temporary injunction renders needless a repetition of the facts which are stated in the opinion of the court. 2 Mon. 510. The complaint was filed April 20, 1876, and contained the following allegations: That the plaintiffs [respondents] and their grantors and predecessors in interest on and before April 19, 1876, were the owners of the Fabian water ditch, which had been constructed for the purpose of conveying all the water of Silver creek flowing in Ottawa gulch upon placer mines of plaintiffs in Jenny's basin on Jenny's fork; that they appropriated the water by means of this ditch from the date of its construction and thereby acquired a prior right to the use thereof; that while they were in the peaceable possession of the water, the defendants [appellants] wrongfully diverted the same from the Fabian ditch, by means of another ditch, which intersected Silver creek at a point above the head of plaintiffs' ditch; that the defendants have continued

to divert this water, and threaten to continue to so divert the same to the great and irreparable injury of the plaintiffs; and that the plaintiffs will be wholly deprived of the use of the water unless the defendants are enjoined from so diverting the same. The prayer of the complaint is for a preliminary injunction, and also that the injunction be made perpetual upon the final hearing.

The answer denies specifically the allegations in the complaint and alleges that Ottawa gulch was located and recorded October 4, 1864, as mineral land, and the water flowing therein, which includes that claimed by the plaintiffs, was appropriated for the use of the miners in the gulch; that the defendants have been working on their placer ground in this gulch and using the water since July 20, 1866; that long after this use and appropriation of the water by the defendants, certain parties, J. C. Loyd and others, owned placer claims in Jenny's basin on Jenny's fork of Ottawa gulch and recognized the rights of the defendants to the water; that said Loyd and others entered into an agreement with the defendants and other miners of Ottawa gulch that they would permit the water to flow down the gulch whenever the defendants and other miners wished to use the same, if the defendants and other miners would allow Loyd and others to convey the water to Jenny's basin; that Loyd and others then dug the ditch, which is claimed by the plaintiffs, under the agreement and were not to have any right to the use of the water as against the defendants and other miners in Ottawa gulch; that this was a personal license in favor of Loyd and others, who are the owners of the Fabian ditch, and that the ground in Jenny's fork, on which Loyd and others had the license to use the water, has been wholly worked out; and that the defendants require the water to mine their placer ground in Ottawa gulch, and committed the injuries complained of by the plaintiffs in constructing a reservoir in the gulch above the mouth of Jenny's fork.

The replication denies every allegation in the answer and alleges that the defendants are estopped from asserting the agreement "for the reason that said defendants were present at the time and date of the purchase by plaintiffs of said ditch and water-right from their grantors, and did not notify these plaintiffs of

the existence of any such agreement;" that the plaintiffs had no notice of this agreement at the date of their purchase; and that the mining ground in Ottawa gulch above the mouth of Jenny's fork remained vacant for a long period after the Fabian ditch had been constructed and the water had been appropriated by the grantors of the plaintiffs.

At the trial, sixteen special findings were submitted to the jury and the following facts were established by the verdict thereon: 1. That the defendants or their grantors appropriated the water of Ottawa gulch prior to the time that Loyd and others constructed their ditch from this gulch to Jenny's basin. 2. That the parties who constructed the Fabian ditch made the agreement with the defendants and other miners, which is contained in the answer. 3. That the plaintiffs did not have any notice of this agreement when they purchased the ditch of Loyd and others. 4. That the plaintiffs were first notified of this agreement in the summer of 1874. 5. That Loyd and others and the defendants and others were the parties to this agreement. 6. That it was under this agreement that the parties who constructed the Fabian ditch were permitted to use the water of Ottawa gulch through their ditch. 7. That the parties to the agreement owned, at the time it was made, claims numbered from thirty to thirty-seven inclusive in Ottawa gulch, and that other miners then owned claims numbered from thirty-eight to forty-one inclusive; that claims numbered from thirty to thirty-nine were below the junction of Jenny's fork with the gulch, and the claims numbered forty and forty-one were at and above the junction. 8. That the defendants were owners of claims in the gulch and mining there at and before the construction of the plaintiffs' ditch, and that the defendants are miners and claim owners in the gulch, and the water of the gulch is necessary to mine successfully their ground. 9. That the defendants have mined their claims in this gulch since 1866. 10. That the plaintiffs hold and own their ditch by purchase from the original owners and constructors. 11. That it is necessary to reservoir the water in Ottawa gulch to work successfully the claims therein. 12. That a reservoir could be constructed at the junction of Jenny's fork with Ottawa gulch.

13. That a reservoir so constructed would not enable the miners to work out all claims that were owned by the parties to the agreement at the time it was made. 14. That this agreement was verbal. 15. That the water of Ottawa gulch was used at the time of the sale of the mining claims in Jenny's basin by Loyd and others to the plaintiffs, and that this water was necessary to mine the claims. 16. That the defendants, before the commencement of this action, diverted the water of Ottawa gulch from plaintiffs' ditch.

No exceptions were taken to the findings of the jury, and each party moved for judgment upon the pleadings, evidence and findings. The court rendered a decree that the preliminary injunction be made perpetual, but reserved for the defendants the right to take the water flowing through plaintiff's ditch below the mining ground of the plaintiffs in Jenny's basin. The preliminary injunction restrained the defendants from diverting from the plaintiffs' ditch the water flowing down Ottawa gulch.

The appellants claim that the respondents cannot obtain equitable relief under the pleadings, and that an action in the nature of ejectment would afford a legal remedy. The following cases are cited in support of this position: *Lewis v. Cocks*, 23 Wall. 466; *Raffetto v. Fiori*, 50 Cal. 363; *Felton v. Justice*, 51 id. 529. In *Lewis v. Cocks*, *supra*, Cocks filed a bill in equity praying that the defendant might be decreed to execute a deed for two houses and lots on receiving the price paid for the same by the defendant. The court held that there was no fraud in the case, or any other matter which is specially the subject of equitable jurisdiction; that the bill was not the proper means to recover the possession of land of which Cocks was out of possession; and that "an action of ejectment is an adequate remedy." In *Raffetto v. Fiori*, *supra*, an action of trespass was brought in May, 1873, to recover damages and obtain an injunction, and it was one of the findings that the defendants had been in the possession of the land since August, 1870. The court held that this action could not be maintained where the plaintiff is actually dis-seized of the land and the defendant is in the adverse possession thereof. In *Felton v. Justice*, *supra*, the complaint alleged that

the defendants forcibly ousted the plaintiffs from the possession of the plaintiffs' ditch, on the plaintiffs' rancho, and converted to their use the water flowing therein, and threatened to continue the trespass. The court approved the case of *Raffetto v. Fiori, supra*, and held that a court of equity will not restrain the commission of threatened trespasses by the defendants, who are in the adverse possession of land, when the plaintiffs are totally dis-seized.

In the case at bar, the appellants did not disturb the respondents in the possession of the Fabian ditch, but diverted the water which was an incident to the ditch. We are aware of some rules which are applicable alike to land and water, and that in a legal sense, property in a water-course is comprehended under the general name of land, and that a grant of land conveys to the grantee the water which flows naturally over the surface. But we have not seen any case in which the doctrine of the foregoing decisions, relating to the remedy for the recovery of the possession of land, has been applied to a controversy respecting the prior right to the use of water. On the contrary, many judgments in the courts of the States and Territories, in which the work of mining for the precious metals is pursued under the same conditions which exist in this Territory, have been entered and affirmed in actions in which the complaint was in substance the same as that under consideration and the equitable relief of an injunction has been granted in favor of a party who was not in the possession of the water when the suit was commenced.

The appellant insists that the supreme court of California in the case of *Felton v. Justice, supra*, recognized the rule that the law which governs the right to the possession of land applies also to the right to the use of water. This is not our view of the principle which is upheld in the opinion in which the court says: "The purpose of this action is to enjoin the commission of trespasses upon lands alleged to be the property of plaintiffs. The plaintiffs allege that the defendant had entered upon the lands, and ousted and removed plaintiffs therefrom." We think that the court, in using the term "lands," referred to the rancho and ditch thereon, and did not include the water-right. It must be

admitted that the brevity of the opinion on this point makes its meaning a fair subject of criticism, and we may have misunderstood the case. Conceding that the appellants are correct in their interpretation of this decision, we are satisfied, by an examination of the authorities, that the complaint of the respondents states a good cause of action and prays for appropriate relief.

Mr. Yale, in considering remedies for the diversion of water, says: "Actions for injuries to water-rights are three fold: 1. By an action for damages in using or diverting the water, which sounds only in damages, or in assumpsit for so much water used, under a contract, express or implied. 2. By an action for a perpetual injunction to restrain the further use of the water, upon the ground of irreparable injury. 3. By an action in the nature of a proceeding to abate a nuisance, when an impediment or obstruction has been created to prevent the flow of water in its natural course. The cases in our courts furnish numerous instances of actions of each description. \* \* \* The injunction is but a provisional remedy, and but an incident to the action, or it may be the sole purpose of the bill." Yale on Mining Claims and Water-Rights, 213. This commentator has defined clearly the law upon this subject. In a majority of the cases that we have examined, the aggrieved party asks for damages and an injunction, but the allegations of the facts which are essential to secure the equitable relief are similar to those of the complaint in this case. The omission or denial of the prayer for damages does not affect the right to an injunction. In *Tuolumne W. Co. v. Chapman*, 8 Cal. 392, the complaint is the same as that of the respondents, and the judgment of the court below in overruling a demurrer thereto is affirmed, and it is held that the "continued diversion of water from a party entitled to it is such an irreparable injury as a court of equity will redress." In *Parke v. Kilham*, 8 Cal. 77, it is held that "a ditch to carry off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood the premises." These decisions are based upon the well-settled principle that courts of equity will always interfere by injunction when irreparable injury will be caused by the obstruction of a water-course or the diversion of water. 2 Story's

Eq. Jur., §§ 926, 927; Angell on Water-courses, §§ 444-447. The complaints in the cases of *Wilkins v. McCue*, 46 Cal. 656, and *Covington v. Becker*, 5 Nev. 281, are the same in substance as that before us, and an injunction is the sole relief that is sought. In *Higgins v. Barker*, 42 Cal. 233, the plaintiff asked for damages and an injunction and the court granted the injunction and refused to allow any damages. In *Lake v. Tolles*, 8 Nev. 285, the prayer of the complaint was for the title to the use of the water, damages for its past diversion and an injunction, and a decree was entered for the plaintiff and damages in the sum of one cent. The court held that "the complaint was purely equitable \* \* \* save so far as it showed and prayed damage." In *Barnes v. Sabron*, 10 Nev. 217, Mr. Chief Justice HAWLEY says: "The rule of law is, that in cases for the diversion of water, where there is a clear violation of a right and equitable relief is prayed for, it is not necessary to show actual damage; every violation of a right imports damage; and this principle is applied wherever the act done is of such a nature as that by its repetition or continuance it may become the foundation of an adverse right." The courts of this Territory have adhered to the rules which have been enforced in the States of California and Nevada. *Caruthers v. Pemberton*, 1 Mon. 115; *Harris v. Shontz*, id. 212; *Toombs v. Hornbuckle*, id. 286; *Columbia M. Co. v. Holter*, id. 296; *Gallagher v. Basey*, id. 457; *Barkley v. Tieleke*, 2 id. 59. In *Harris v. Shontz*, *supra*, a perpetual injunction was decreed, but no damages were assessed for the diversion of the water. In *Columbia M. Co. v. Holter*, *supra*, it was held that the plaintiff was entitled to nominal damages and a perpetual injunction to restrain the defendant from diverting the water. In *Gallagher v. Basey*, *supra*, the prayer of the complaint is for an injunction to restrain the defendant from the use of the water and judgment was entered for the plaintiff. In *Barkley v. Tieleke*, *supra*, which was an action involving the prior right to the use of water, Mr. Justice SERVIS says: "The defendants insist, that before relief can be had under the claim made by plaintiff, he must resort to an action at law to settle the legal title to the property in question. \* \* \* Upon a review of the authorities, we are

satisfied that chancery is a well-defined remedy for relief in an action in the nature of a nuisance, of which this clearly partakes, without resort to an action at law. In fact, equity seems to be the only appropriate remedy to afford relief in cases like the one under consideration." The case of *Atchison v. Peterson*, 1 Mon. 561, was appealed to the supreme court of the United States, and Mr. Justice FIELD, in delivering the opinion affirming the judgment, says: "In all controversies, therefore, between him (the first appropriator) and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant. But whether, upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction." 20 Wall. 515.

The appellants contend that they have been deprived of a trial by a jury of the right to the use of the water in controversy, and that the court below erred in submitting only the findings that it deemed proper, and basing its decree thereon. The conclusions that we have announced regarding the sufficiency of the complaint, the equitable character of this action, and the remedy of the respondents, determine these objections. This is a case in equity in which a jury trial cannot be claimed as a right by the parties. *Kleinschmidt v. Dunphy*, 1 Mon. 118. In *Lake v. Tolles*, *infra*, the ruling of the court below in refusing to try the issues by a jury was affirmed. The case of *Gallagher v. Basey*, *supra*, in which the court disregarded some of the special findings of the jury in rendering its decree, was appealed to the supreme court of the United States, and Mr. Justice FIELD, in the opinion affirming the judgment of this court, says: "If the remedy sought be equitable, the court is not bound to call a jury, and if

it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. \* \* \* Sometimes in the same action both legal and equitable relief may be sought, as for example, where damages are claimed for a past diversion of water, and an injunction prayed against its diversion in the future. Upon the question of damages, a jury would be required; but upon the propriety of an injunction, the action of the court alone could be invoked." 20 Wall. 680.

The next matter for our consideration is the effect of the agreement, which is referred to in the pleadings and findings, upon the rights of the appellants and respondents. Loyd and the other persons who constructed the Fabian ditch and were the grantors and predecessors in interest of the respondents, had the personal license of diverting and using the water of Ottawa gulch upon their mining claims in Jenny's basin during the time that the appellants and other miners did not need the same for the working of their ground in Ottawa gulch. No interest in land was thereby conveyed or created, and the agreement was valid between the parties, although it was not reduced to writing and put upon the records of the mining district or the proper county. Afterward, Loyd and his partners expended money and labor in digging their ditch and making other improvements which were necessary to mine their property in Jenny's basin. By asking for and obtaining the privilege of using the water in controversy for this particular purpose under the foregoing conditions, Loyd and his associates recognized the prior appropriation thereof by the appellants. The legal relations of the parties were the same as those of landlord and tenant. The doctrine of the tenant's estoppel would prevail against Loyd and his company, when they were in the possession of the water under the license, and the prior rights of the appellants could not be disputed. Bigelow on Estoppel (2d ed.), 359, 381, and cases there cited. But this privilege, which was acquired under the license or agreement, was limited strictly to the original parties, and could not be sold and transferred to the respondents by Loyd and the other licensees. 2 Am. L. C. (4th ed.) 736, and cases there cited; Washb. on Ease. (2d ed.) 8; Browne on Statute of Frauds (2d ed.), § 22; *Babcock v. Utter*, 32 How. Pr. 439.

It appears that the water has been used upon the mines in Jenny's basin since 1867, without injury to the claim-holders of Ottawa gulch, until the appellants were working at a point which made necessary the construction of the reservoir that is mentioned in the answer, and this action was commenced. The respondents maintain that their grantors appropriated the water when the Fabian ditch was located and surveyed, but we think that the appropriation by the respondents must date from the time when they took possession of the ditch in 1872. *Smith v. O'Hara*, 43 Cal. 371. The appellants were the prior appropriators of the water, and their interests could not be destroyed or forfeited by the omission to make a record of the agreement, or the ignorance of the respondents concerning it when they bought their property of Loyd and others. At any time the appellants could revoke this license. 1 Washb. Real Prop. 400, and cases there cited; *Babcock v. Utter*, *supra*; Washb. on Easements (2d ed.), 23, and cases there cited.

The following question is decisive of this case: Are the appellants estopped from claiming the water of Ottawa gulch, as against the respondents, by their conduct at the times when three deeds were executed and delivered by Loyd, Moss and Riley to the respondents? The appellants are correct in their position that the replication fails to set forth all the facts which constitute an equitable estoppel. It does not allege that the respondents were influenced in buying the property of Loyd, Moss and Riley by the conduct of the appellants, or that the respondents had no convenient means of acquiring knowledge of the true state of the title to the water of Ottawa gulch. It therefore does not appear from this pleading that the respondents have been injured by any intended deception in the conduct of the appellants, or gross negligence on their part which amounts to constructive fraud. 1 Story's Eq. Jur. (9th ed.), § 391, and cases there cited; *Brant v. Virginia C. & I. Co.*, 93 U. S. 326, and cases there cited; *Sharon v. Minnock*, 6 Nev. 377; *Bigelow* on Estoppel (2d ed.), 437; *Davis v. Davis*, 26 Cal. 23. The appellants did not raise this question in the court below, and took no exception to the replication, and allowed evidence to be pro-

duced on the trial in the same manner as if the facts constituting the estoppel had been properly pleaded, and thereby waived the defects in the pleading. *Davis v. Davis, supra.*

The decree states that the equities of the case are in favor of the respondents, and the appellants insist that the judgment cannot be supported because there is no special finding upon the issue of estoppel. The decisions, which are relied on by the appellants, were made under the Code of Civil Procedure of the State of California, which changed the rule relating to implied findings of facts. *Campbell v. Buckman*, 49 Cal. 362; *N. P. R. Co. v. Reynolds*, 50 id. 90; *Harris v. Burns*, 51 id. 528. This action must be governed by the Civil Practice Act, approved January 12, 1872, and we must presume, unless the contrary appears, that the court below found on this issue for the party for whom the judgment was entered. *Ming v. Truett*, 1 Mon. 322; *Morse v. Swan*, 2 id. 306; *Ervin v. Collier, ante*, 189.

The transcript contains the following evidence upon this point: We omit that which sustains the special findings of the jury. The respondents bought some mining claims in Jenny's basin and received their deeds from Riley, Moss and Loyd, which were dated, respectively, October 10, 1872, October 11, 1872, and September 21, 1873. The deeds described the ground "with the water-right and ditches and other appurtenances thereunto belonging to the aforesaid mining ground." Collins, one of the appellants, signed his name as a witness to the execution of the deeds by Riley and Moss, and Mayger, the other appellant, was a witness to the execution of the deed by Loyd, and, as the recorder of the mining district, placed upon the records the deeds from Riley and Moss. The appellants knew that these mining claims could not be worked successfully without the water of Ottawa gulch, and that the Fabian ditch and this water were included in the ditches and water-right mentioned in the deeds to the respondents. The deeds were drawn up by Mayger in the presence of Collins, who knew that the sale was being made, and the grantors and respondents consulted with Mayger respecting the contents of the deeds. Neither Collins nor Mayger informed the respondents of any claim by any persons to the water in dis-

pute. Do these facts uphold the implied finding of the court on the issue of estoppel, or does the contrary appear therefrom? Was it the duty of Collins and Mayger to keep silence or speak out concerning their right to the water of Ottawa gulch when the deeds were executed to the respondents? The respondents could gain no knowledge of the state of the appellants' title by an examination of the records of the mining district and county in which the property is situated, which is often the convenient means of ascertaining a fact of this kind. The respondents acquired by their purchase the possession of the water, which had been used by their grantors more than five years without interruption, and could presume reasonably that this use had been rightful.

In *Hale v. Skinner*, 117 Mass. 474, Mr. Chief Justice GRAY refers to "the doctrine of courts of equity that a person witnessing or present at the execution of a conveyance of property by another is estopped afterward to set up title in himself." Mr. Bigelow, in his work on Estoppel, says: "Thus the witnessing of a deed to one's own land, done knowingly, for a grantee in ignorance of the witness's rights, will (at least in equity) estop the witness to set up against the grantee a claim to the land existing in the witness when the deed was executed." Bigelow on Estoppel (2d ed.), 451, 471, and cases there cited. Mr. Story says in his Commentaries on Equity Jurisprudence: "In many cases a man may innocently be silent. \* \* \* But, in other cases, a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what is said or done, and had become a party to the transaction. \* \* \* So, if a man should stand by, and see another person, as grantor, execute a deed of conveyance of land belonging to himself, and, knowing the facts, should sign his name as a witness, he would in equity be bound by the conveyance." Story's Eq. Jur. (9th ed.), § 385. In *Gregg v. Von Phul*, 1 Wall. 274, Mr. Justice DAVIS says: "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate [to be] sold and improved, with knowledge

that the title has been mistaken, he will not be allowed afterward to assert his claim against the purchaser. And justly so, because the effect of his silence has actually misled and worked harm to the purchaser." We might cite other authorities in support of these propositions. 1 Greenl. on Ev. (12th ed.), § 207; Angell on Water-courses (6th ed.), § 328; *Chapman v. Chapman*, 59 Penn. St. 214; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 354; *Niven v. Belknap*, 2 id. 573; *Brown v. Bowen*, 30 N. Y. 520; *Henshaw v. Bissell*, 18 Wall. 255.

The application of these principles to the facts before us compels us to conclude that the appellants should have asserted their claim to the water of Ottawa gulch when the deeds were executed by Moss, Riley, and Loyd; and that their conduct and silence at that time estop them from speaking in this action against the respondents. The respondents could not buy from their grantors any title under the parol license, conferred by the appellants, and were induced to pay Moss, Riley and Loyd for what they did not own. The appellants acted with a full knowledge of their rights, when the respondents were in ignorance regarding them and without convenient means of acquiring information.

The judgment protects with a just discrimination the rights of the parties and is affirmed with costs.

*Judgment affirmed.*

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COMMISSIONERS OF JEFFERSON COUNTY, respondents, v. LINEBERGER ET AL., appellants.

**SUMMONS.** In an action on his official bond against a defaulting treasurer and his sureties to recover the penalty therein for breach of the conditions thereof, it is a sufficient compliance with the statute to state in the summons that the action is brought to recover the penalty named in the bond, with interest and costs of suit.

**COUNTY TREASURER'S BOND.** An official bond voluntarily entered into by a county treasurer, with sureties for the faithful performance of his duties, and to save the county harmless in his discharge of the same, though erroneously given to the Territory instead of the county commissioners as required by law, is good and binding as a common-law bond.

**PARTIES TO AN ACTION** — *in name of party in interest.* In action upon such a bond, the county being the real and only party in interest, and being created by law a body politic and corporate, through its board of commissioners, its legally constituted agents, is the proper party to institute action.

**DEFENSES.** It is no defense to an action upon said bond brought to recover the penalty thereof for breach of conditions, to allege in answer that the office and safe furnished by the county were broken open and robbed without any want of reasonable care on the part of the treasurer, and to strike such a defense from the answer would not be error. Neither is it a proper defense to such an action to allege that the commissioners compromised and settled the claim of the county, accepting part of the moneys due, and in consideration thereof releasing the treasurer and his sureties from liability for the balance. Such defense should be stricken from the answer, and all evidence of such a compromise or settlement was properly excluded from the consideration of the jury. It is not in the power of the county commissioners to compromise such a claim. Their only duty is to prosecute the delinquent official and his sureties. There could be no legal consideration for such an agreement, and neither parol or record evidence thereof would be received.

**INTEREST** — *vexatious and unreasonable delay.* The case of a county official refusing to pay over the moneys of the county upon proper demand, and compelling the institution of suit to recover the same, is such an unreasonable and vexatious delay contemplated by the statute, as to entitle the county to recover interest on the same.

### *Appeal from First District, Jefferson County.*

THE cause was tried before BLAKE, J.

E. W. TOOLE for appellants.

The summons in the case was radically defective in not stating the *cause* and general nature of the action.

Defendants' demurrer to the complaint should have been sustained for the following reasons: First, the bond was given to the Territory instead of the county commissioners. Second, it does not purport to be for the use and benefit of the county. Third, the complaint sets forth no facts to show how the Territory became trustee for plaintiff. Fourth, there is no statute enabling the Territory to become such trustee. Fifth, the bond lacks in the essential element of having a party able to contract. Sixth, nothing shows that suit was brought by order of the commissioners. Cod. Sts. 569, § 2.

On the theory of the complaint the treasurer is made the in-

suror of the county funds. For contrary authorities see 19 Johns. 381; 7 Cranch, 242; 2 Kent's Com. 610; Story on Bail. 302-390.

The controversy involved merit and there was good consideration for a compromise which courts should uphold. *Steele v. White*, 2 Paige, 478; 21 Cal. 122.

The commissioners are authorized to compromise claims. Cod. Sts. 569, § 2, and 435, § 14. After having made it they are estopped from denying it. *Lee v. Mills*, 6 Monr. 91; 1 Pars. on Cont. (5th ed.) 438.

Till the settlement is set aside by some mode known to the law, it must stand as conclusive between the parties. 18 Ohio, 6; 9 Wend. 508; 2 Denio, 26; 2 Hill, 14; 23 Barb. 328.

If commissioners exceeded their authority the remedy is *certiorari*. 18 Cal. 144.

The case is not such as to justify a claim for interest.

JAMES G. SPRATT, district attorney, for respondent.

The summons conformed to the statute.

The bond, though given to the Territory by mistake, shows in its several conditions that it was for the use of the county. The provisions of law relating to the duties of county officers show that the county alone is interested and the only proper party to the action. *Sharp v. Contra Costa County*, 34 Cal. 285; *People v. Ingersoll*, 58 N. Y. 1.

The bond was voluntarily given by defendants for the sole use and benefit of the county and they are estopped from denying its validity. *Baker v. Bartol*, 7 Cal. 551; *Curia v. Packard*, 29 id. 200; *Lomas v. Brown*, 16 Barb. 325.

Our statute requires action in the name of real party interested.

The conditions in the bond fix and determine the responsibility of the treasurer, and by no other standard is he to be judged or held. It is unconditional responsibility to pay over on proper demand. *United States v. Prescott*, 3 How. (U. S.) 578; 9 Wall. 56, 161; 3 Penn. 572; 6 Ohio, 607; *United States v. Thomas*, 15 Wall. 333.

It was purely a question of contract and not one of bailment. Evidence of a pretended parol settlement was properly excluded.

The commissioners had no authority to make such a settlement or release defendants from the conditions of their contract. The board of commissioners is a court of record, and nothing but a record of such a transaction would be admissible in any court. There could be no consideration to support such a pretended verbal compromise.

Interest is given by statute for unreasonable and vexatious delay.

WADE, C. J. Before proceeding to discuss the questions raised by this appeal, I deem it my duty to say that the record in this case is unworthy a place among the files of this court, and if its defects had been discovered before the adjournment of the last term, at which time the case was submitted, the same would not have been received. The transcript seems to have been made with the sole desire of extorting large fees for the labor of writing the same. It is a double transcript, and of course double fees were received for making it. It contains 128 pages, when, if properly made and condensed, 40 pages were sufficient to contain all that was necessary, to properly raise every question in the case. The record commences with the complaint, then follows a demurrer, then the order overruling the same, the answer, a motion to strike out portions of the answer, the order sustaining the motion, the replication, the verdict, and the judgment thereon. Then follows at full length a repetition of the complaint, the demurrer thereto, the order overruling the same, the answer, the motion to strike out portions of the answer, the order sustaining the motion, the replication, the verdict and the judgment thereon. If there is any possible reason for this repetition whereby the size of the record is doubled, and the labor of finding any thing therein, except that not wanted, is quadrupled, we have failed to discover such reason, except it exist in the fact that for a record containing 40 pages, only one-third the charge could be made, as for a record of 120 pages. In all such cases, the superfluous matter should be stricken from

the record on motion and at the costs of the party whose business it is to bring a proper transcript into court.

1. This is an action commenced and prosecuted in the name of the county commissioners, upon the official bond of the treasurer of Jefferson county, to recover the penalty for alleged breaches in the conditions thereof. There was a special appearance by Hildebrand and a motion to quash the summons, which was overruled, and upon this action of the court is based the first assignment of error. This alleged error is not embraced in the assignment of errors on motion for a new trial, but this appeal is from the judgment as well as from the order overruling the motion for a new trial, therefore all exceptions properly taken and saved and contained in the judgment-roll can be brought before the court for review. The appellants in their brief rely upon one objection only to the summons, viz.: that it does not state the *cause* and *general nature* of the action as required by section 30 of the Practice Act. This is an action upon a bond to recover the penalty, for alleged breaches in the conditions thereof.

The summons, after designating the court in which the action is brought, the names of the parties, and the time when the defendants are required to answer, describes the cause of action as follows: "The said action is brought to recover judgment for the penalty of a certain bond, executed and signed by the foregoing defendants in the sum of \$15,000 with interest and costs." The object of the action, as disclosed in the complaint, is to recover a judgment for the sum of \$15,000, the penalty of the bond, and the notice contained in the summons sufficiently describes the cause and general nature of the action. Other points are presented in the motion to quash the summons, but as they were not set forth in the brief of the appellants, they are deemed waived. *Cope v. Upper Mo. Min. and Prosp. Co.*, 1 Mon. 53.

2. The next assignment of error raises the question as to the validity of the bond, and in whose name the action should have been commenced. The statute (Cod. Sts. 451, § 87) requires that each county treasurer, before entering upon the duties of his office, shall execute to the board of county commissioners

a bond, with three or more sureties, conditioned for the faithful performance of the duties thereof. The bond of this treasurer, upon which this action was brought, was in fact given to the Territory, and not to the board of county commissioners, as required by the statute. And so the appellants say that the bond does not, by its terms, purport to be for the use and benefit of the county, so as to authorize it to sue upon any breach of its conditions; that the complaint contains no allegation by which the Territory, the obligee in the bond, became the trustee for the county in whose name the action is prosecuted; that the Territory has no capacity, outside of statutory enactment, to become such trustee, and that no such enactment exists; that the bond is therefore wanting in one of the essential elements to its validity, viz.: parties qualified to contract; that the Territory was not so qualified, and the bond is therefore void.

Under this claim of the appellants, obviously the first question to be settled is, whether or not the bond, being given to the Territory, as obligee, instead of the county commissioners of Jefferson county, as required by the statute, is thereby rendered void.

The bond was given for the purpose of securing to Jefferson county its public funds, to be received by its county treasurer. It was a voluntary obligation entered into by competent parties; its purpose was lawful; its consideration sufficient, being that the principal obligor should enter upon and perform the duties and be entitled to the honor and emoluments of the office, and these are the necessary elements of a good and valid bond at common law.

A bond, not good as a statutory bond, being voluntarily given is good as a common-law bond. *Lane v. Kassy*, 1 Metc. (Ky.) 410; *Crowlett v. Eubank*, 1 Bush, 477; *Gatherwright v. Callaway Co.*, 10 Mo. 663, cited in 3 U. S. Digest, first series, 14, § 249.

A bond is not void merely because it may not in all respects conform to the statute under which it was taken. *Van Dusen v. Haywood*, 17 Wend. 70. A variance between a statutory bond and the requisitions of the law is fatal to it only when the con-

dition would impose a greater burden than the law allows. *Commonwealth v. Lamb*, 1 Watts & S. 263. Where a bond is executed without being authorized by statute, the makers cannot defend against it on that ground; it is good as a common-law bond. Drake on Attachment, § 151. A bond is not necessarily invalid, though not authorized by statute. It will be good as a common-law bond where it does not contravene public policy nor violate a statute, and be binding upon the parties to it. *Sheppard & Morgan v. Collins*, 12 Iowa, 573. A voluntary bond entered into by competent parties and for a lawful purpose, not prohibited by law and founded upon a sufficient consideration, is good and valid at common law. *Archer v. Hart*, 5 Fla. 234.

A bond executed by a public officer and his sureties, though not good as a statutory bond, may be binding as a voluntary obligation, and an action at common law may be maintained thereon. *Goodwin v. Carroll*, 2 Humph. (Tenn.) 490.

These authorities would seem to render the conclusion safe that the treasurer's bond is not a void obligation, because the Territory was named as obligee therein, instead of the county commissioners.

The bond being valid, in whose name should an action thereon, for a breach thereof, have been instituted?

The Practice Act in force when the suit was commenced provided that every action shall be prosecuted in the name of the real party in interest. Cod. Sts. 28, § 4.

The statute then as now also provided (Cod. Sts. 433, § 1) that each organized county within this Territory shall be a body corporate and politic, and as such shall be empowered to sue and be sued. Section 5 of the same act provides, that in all suits by or against a county, the name in which the county shall sue or be sued shall be the board of commissioners of the county. Who was the real party in interest to enforce the collection of the penalty of this bond? It is admitted in the pleadings that the defendant, David H. Lineberger, was elected treasurer of Jefferson county, and that he and his sureties executed and delivered to the board of commissioners of said county the bond upon which this action is brought, and that the same was duly accepted

by said board. It appears upon the face of the bond that the same was given to secure the county of Jefferson against the defalcations of its treasurer, and that the Territory had no interest in such treasurer, nor in the money demanded in this action. The statute provides that it shall be the duty of each county treasurer to receive all moneys belonging to his county, from whatever source they may be derived, and all other moneys that are by law directed to be paid to him. Cod. Sts. 452, § 92. The money which the plaintiff is seeking to recover in this action, if recovered, belongs to Jefferson county, and the Territory has no interest therein.

The county then is the real party in interest, and the county commissioners are the proper parties plaintiff. This principle was recognized in the case of *Lomme v. Sweeney & Holter*, 1 Mon. 584, which was an action upon an undertaking in replevin, executed by the defendants to Roberts, sheriff, and upon which, Lomme, the attaching creditor, instituted an action and recovered a judgment. The same principle has been declared in California.

In *Taaffe v. Rosenthall*, 7 Cal. 514, the court say: "The first objection made by the defendants against the undertaking is, that it is given to the State of California, and not to the defendants. The conditions of the undertaking comply with the terms of the statute. \* \* \* The defect assigned would not seem to be at all material. The defendants, being the parties really in interest, could, no doubt, sue upon the undertaking in their own names." And in *Thornburgh v. Hand*, 7 Cal. 554, the court say: "Formerly where a bond was given to an officer, State or corporation, suit had to be brought in the name of the party holding the legal title, for the benefit of the persons interested, but our statute has introduced a new rule, and by the provisions of the Practice Act, the suit must be prosecuted in the name of the real party in interest. The declaration and bond show beyond all doubt that Baker, the present plaintiff, is the true party in interest, and there was no error in declaring in his own name."

Decisions to the same effect have been made in *Curiac v. Packard*, 29 Cal. 194; *Sacramento Co. v. Bird*, 31 id. 72; *The*

*People v. Ingersoll*, 58 N. Y. 1; *Mendocino Co. v. Morris*, 32 Cal. 145; *Solano Co. v. Neville*, 21 id. 468; *Sharp v. Contra Costa Co.*, 34 id. 285.

Other principles sustain the same position: "The fact that the trustee of an express trust might bring an action in his own name does not, in most instances, preclude the beneficiary or real party in interest from likewise bringing suit in his own name, and the instance of a party for whose benefit a contract was made is a case in which this may be done." *The Camden Bank v. Rogers*, 4 How. 63; 1 Whit. Pr. 64; *Lane v. The Columbus Ins. Co.*, 2 C. R. 65. A promise made by one person to another for the benefit of a third person creates a cause of action in favor of such third person. This principle is laid down in Comyn's Digest, without question of its authority. Many decisions to the same effect are cited in 3d U. S. Digest, first series, p. 524, § 2444. The same principle extends to contracts under seal: "If A. covenant generally to indemnify B., B. may have covenant though he did not seal the articles, and the covenant was not with him." It must undoubtedly appear that the covenant which is alleged to have been broken was made for the benefit of the person bringing the action. *Fellows v. Gilman*, 4 Wend. 419, and authorities cited.

In the case at bar the obligors of the bond, for a valid consideration, viz., that Lineberger should enter upon the duties and receive the emoluments of the office of county treasurer of Jefferson county, promised and covenanted with the Territory, but for the sole and exclusive benefit of the county, that if the condition of the bond was broken by the treasurer, they would save the county harmless. And the purpose of this obligation and contract, the consideration therefor, and for whose benefit it was made, all appear on the face of the bond. Hence the county, by its authorized representatives, can maintain an action on the bond.

3. It is alleged in the answer as a defense to the action that the plaintiffs, the county commissioners, provided the treasurer with an office and safe wherein to keep the funds coming into his hands, and that without any want of reasonable care on the part

of the treasurer, his office was broken open, the safe therein robbed, and the money in question stolen. This defense was stricken out on motion, and this action of the court is assigned as error. Was the matter stricken from the answer a defense to the action? This question is so completely answered by the supreme court of the United States in the case of *The United States v. Eli S. Prescott et al.*, 3 How. 578, that we quote at length from the opinion therein. The action was brought on a bond given by Prescott, with the other defendants as his sureties for the faithful performance of the duties of receiver of public moneys at Chicago, in the State of Illinois. The defense was that Prescott failed to pay over the money for which the action was brought, because the same had been feloniously stolen, taken and carried away from his possession without any fault or negligence on his part, and that he used ordinary care and diligence in keeping the money. The court, by McLEAN, J., says: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant Prescott arises out of his official bond, and principles which are founded upon public policy." After stating the conditions of the bond of Prescott which in effect are the same as those contained in the bond of Lineberger, viz., to pay as the law directs all moneys received by him as receiver of public moneys, the court continues: "The condition of the bond has been broken, as the defendant Prescott failed to pay over the money received by him when required to do so, and the question is, whether he shall be exonerated from the condition of his bond on the ground that the money had been stolen from him?" "The objection to this defense is, that it is not within the condition of the bond; and this would seem conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government; how then can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability contrary to his own express undertaking? The obligation to keep safely the public moneys is absolute, without any condition, express or implied;

and nothing but the payment of it, when required, can discharge the bond." \* \* \*

"Public policy requires that every depository of the public money should be held to strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to frauds which might be practiced with impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of customs, receivers of public money, and others who receive more or less of the public funds, and what losses might not be anticipated by the public! No such principle has been recognized or admitted as a legal defense. And it is believed that the instances are few, if indeed any can be found, where any relief has been given in such cases by the interposition of congress."

"As every depository receives the office with a full knowledge of its responsibilities, he cannot in case of loss complain of hardship. He must stand by his bond and meet the hazards which he voluntarily incurs."

If we should substitute the name of Lineberger, county treasurer, for that of Prescott, receiver of public moneys, the language and the reasoning of the foregoing decision would be equally applicable. The treasurer is not bailee of the county funds. His liability is fixed by the condition of his bond. His promise to pay over the money belonging to the county as the law directs is absolute, and the sureties on his bond guarantee this promise. Payment when required can alone discharge the bond. In the case of *The Commonwealth v. Comley*, 3 Penn. 394, GIBSON, C. J., says: "The opinion of the court in the case of *The United States v. Prescott*, *supra*, is founded in sound policy and sound law. The responsibility of a public receiver is determined not by the law of bailment which is called in to supply the place of a special agreement where there is none, but by the condition of the bond. The condition of it in this instance was to 'account for and pay over the moneys to be received; and we would look in vain for

a power to relieve [from the performance of it.' \* \* \* A loss by a visitation of Providence, which no vigilance could prevent, would present a more meritorious claim to relief, one would be apt to think, than a loss by robbery, which is always preceded by a greater or less degree of negligence. A receiver or his surety would come before a chancellor with an ill grace on that ground, even if there was a power to relieve him. The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case, and his discretion, were he at liberty to use it, would be influenced by considerations of general policy."

To the same effect are the following cases: *Muzzy, supervisor, v. Shattuck*, 1 Denio, 233; *United States v. Dashiell*, 4 Wall. 185; *United States v. Morgan et al.*, 11 How. 160; *United States v. Thomas*, 15 Wall. 337; *State v. Harper*, 6 Ohio St. 607.

The cases of *Dunlop v. Monroe*, 7 Cranch, 242, and *Bartlett v. Crozier*, 15 Johns. 250, referred to by appellants, wherein the general principle of law is announced that whenever an individual has sustained an injury by the misfeasance or nonfeasance of an officer, who acts or omits to act contrary to his duty, the law affords redress, are not in point, and certainly are not in conflict with the decisions we have cited, which hold that payment alone can discharge the bond. And the fact that the commissioners of the county provided the treasurer with an office and a safe is wholly immaterial. He was not obliged to keep his money in the safe. He was only required to pay it over according to law, and where he kept it before such payment was not material to inquire. With a good office and the best of safes, we say, as did the court in the Prescott case, that a treasurer would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss without laches on his part, if such a defense were permitted.

4. The answer alleges as a further defense that the board of commissioners did compromise and settle with the treasurer re-

ceiving a part of the money for which he was in default, in full discharge and settlement of the whole amount due from him, whereby the treasurer and the sureties upon his bond were wholly released from the obligations thereof. There was a motion to strike these allegations from the answer, which was denied, and upon the trial the defendants sought to prove the alleged settlement and compromise by parol proof, which was denied by the court.

Had the commissioners authority to receive from the treasurer a portion of the public moneys due from him, and in his possession and so reported by him, and in consideration thereof to cancel his remaining indebtedness to the county, and to discharge him and his sureties from the obligation of his official bond? In more direct language, have the commissioners authority to release a defaulting treasurer, and to discharge his sureties from their promise and covenant to answer for his default?

Every county is a corporation. The commissioners are its agents, they act with defined powers. They have no authority beyond what the statute confers. The statute (§ 14, p. 435, Cod. Sts.) defines certain powers of the commissioners and provides that they shall have the power to perform such other duties as are or may be prescribed by law. Among the other duties prescribed by law are the following (§ 2, p. 569, Cod. Sts.): "It shall be the duty of the county commissioners (in addition to the duties herein prescribed by law) to audit, adjust and settle all accounts to which the county shall be a party; to order the payment, out of the county treasury, of any sum of money found to be due from the county; to enforce the collection of all moneys due the county; to order suit to be brought on the bond of any delinquent, and to require the district and county attorney to commence and prosecute the same" \* \* \*.

Upon this section the appellants base their opinion that the commissioners have the right to settle and compromise with a defaulting treasurer, and to discharge him and his sureties from his official bond without receiving the amount due from him to the county.

True, the commissioners are required to audit, adjust and settle all accounts to which the county shall be a party, but is a

claim or demand against a defaulting treasurer and his sureties arising upon his official bond to be treated as an account of the county against those persons? We think not. An account is a detailed statement of the mutual demands in the nature of debt and credit between parties, arising out of contracts or some fiduciary relation. 1 Bouv. Law Dic., title Account. If this is an account, it would read as follows:

“DAVID H. LINEBERGER, treasurer, in account with JEFFERSON COUNTY, Dr.

To \$7,431.64, stolen from you on the night of December 31, 1875. Cr.

By \$3,955.49, returned by you.

Balance due, \$3,476.15 ”

We do not think such a demand as this which is a cause of action in favor of the county, arising upon the official bond of the treasurer for breaches thereof, can be called an account within the meaning of the statute. This view is strengthened and supported by the subsequent sentences in the section of the statute cited, which provide, not that it shall be the duty of the commissioners to settle and compromise with a defaulting treasurer, without receiving all that is due from him to the county; not that it shall be their duty to discharge the bond of the treasurer while he is a defaulter to the county, but that it shall be their duty, “*to enforce the collection of all moneys due the county,*” and “*to order suit to be brought upon the bond of any delinquent, and to require the district and county attorney to prosecute the same.*” If a treasurer or any other officer is a defaulter to the county, instead of discharging him from his bond without exacting payment of the full amount due, the commissioners have but one duty in the premises, and that is to prosecute such defaulter, and for this purpose they are authorized to command the services of the district attorney.

They cannot compromise with a delinquent, for they are required to prosecute him. If Mr. Lineberger by reason of robbery, or for any other reason failed, upon legal demand, to account for and pay over the county funds as directed by the law, he was

a defaulter, and the imperative duty of the commissioners, upon being informed thereof, was to prosecute such delinquent upon his official bond, and to compromise with a defaulter under such circumstances would, upon the part of the commissioners, be a gross violation of the letter of the statute and of their duty.

But if the language of the statute requiring the commissioners to prosecute a defaulting officer did not mean any thing, and if they had, notwithstanding the imperative command of this language, authority to settle and compromise with a defaulting treasurer, this agreement so to do, alleged and sought to be proved in the action, was utterly void for want of consideration. The treasury had been robbed. By some means the treasurer had become possessed of a part of the money stolen. It then became his duty at once to have paid the same into the treasury. He held the money as treasurer. It belonged to the county. But instead of paying it over, he proposed to surrender to the commissioners a part of the stolen money recovered, upon condition that they release him and his sureties from his official bond, and this it is alleged the commissioners agreed to do. He did not propose to make good his default or any part thereof out of his private funds, but simply to hand over a part of the stolen money in his possession upon condition that he and his sureties be released from paying the balance of his default. There could have been no consideration for such an agreement. The treasurer should at once have surrendered all the money in his hands belonging to the county, and there was no consideration for the alleged agreement in which the commissioners attempted to hire him to do his duty. Even if the commissioners were clothed with authority to compromise with a defaulter, and to discharge his official bond, the exercise of such a power would be against public policy. It is not the business of congress, legislatures or boards of commissioners to relieve men from the obligation of their voluntary contracts. In this case the parties contracted with full knowledge of all the facts. They knew the obligations they assumed by signing the bond. In consideration of the benefits to be received, they voluntarily took upon themselves all the risks and liabilities to be incurred. And after having received

the benefits they cannot shrink from the responsibilities. For these reasons legislatures refuse to interfere. The court say, in the *United States v. Prescott*, that in the case of robbery where the public moneys have been stolen from the officer without any fault or neglect on his part, making as strong a case as can be imagined, the instances are few, if indeed any can be found, where any relief has been given, even in such strong cases, by the interposition of congress. The reason is obvious. Men must stand by their contracts. They cannot receive the benefits and resort to legislatures to be relieved from the liabilities.

But whatever may be the policy of congress or legislatures in relation to relieving defaulters from the conditions of their official bonds, the power thus to do does not reside with the county commissioners, as we have seen from an examination of the statute defining their powers and duties, and any evidence tending to show a compromise and settlement of the character named was properly excluded from the jury.

5. It was admitted in the pleadings that on the night of December 31, 1875, the treasurer was in default. It then became his plain duty and that of his sureties to pay. This they failed and refused to do. They compelled the county to institute an action to recover the amount of their defalcation which they admitted. This makes a clear case of vexatious delay in the payment of a demand justly due whereby interest accrued upon the demand under the statute (Cod. Sts. 497, § 2) which provides that creditors shall be allowed to collect and receive interest at the rate of ten per cent per annum on moneys withheld by an unreasonable and vexatious delay. The judgment is affirmed with costs.

*Judgment affirmed.*

KNOWLES, J, concurring. My opinion touching the legal propositions presented in this case constrain me to present briefly my views for concurring in the judgment ordered to be entered therein.

1. This bond is valid and the county commissioners of Jefferson county could bring this action.

2. Under the decisions of the supreme court of the United States by which we are bound, any officer charged with the safe-keeping and disbursement of public moneys and for which he is required to account is civilly liable for any deficiency in the same, although such deficiency may have occurred by reason of the stealing of such moneys by a stranger, and without the knowledge or connivance of such officer.

3. I hold that any claim against such officer on account of such deficiency may be settled or compromised by any board of county commissioners, to whose county such moneys belonged.

4. The fact that said county commissioners make no record in the minutes of their official proceedings of such settlement or compromise will not render the same invalid. And the said settlement or compromise need not be evidenced by a record in the official proceedings of such board, but the same may be proved by parol evidence.

5. For every such settlement or compromise there should be a legal consideration.

6. The paying over to the county commissioners or to their successors in office by the said Lineberger of moneys for which he should account, and of which he was intrusted with the care, custody and disbursement, and which belonged to the county, would not be a legal consideration for the settlement or compromise of the claim due the said county on account of such deficiency. The county in such a case would receive only its own, and the said Lineberger would part with nothing to which he had any legal right further than to safely keep and disburse the same according to law. He would have no legal right and should have none, to take moneys belonging to the county and with which he was only intrusted by law with the custody and disbursement, and use it to liquidate a claim he individually owed said county; and the board of county commissioners would have no right to give Lineberger this debt, any more than they would have the right to give him the county buildings of their county.

## TAYLOR, appellant, v. ASHBY, respondent.

STATUTORY CONSTRUCTION — *license of "insurance company agent."* An act of the legislative assembly of the Territory, approved May 8, 1873, provides that "there shall be levied and collected by the tax collector a license tax \* \* \* for each and every insurance company agent or agencies, transacting business in this Territory, the sum of one hundred and fifty dollars per year." *Held*, that every person, who is the agent of an insurance company, must pay this license, and that an insurance company is not liable therefor. *Held, also*, that the number of insurance companies having the same agent does not affect his license, which cannot exceed "one hundred and fifty dollars per year."

*Appeal from Third District, Lewis and Clarke County*

THE judgment was rendered by WADE, C. J.

J. K. TOOLE, district attorney, third district, and CHUMASERO & CHADWICK, for appellant.

Under the act concerning licenses, approved January 10, 1872, it was the intention of the legislative assembly to require every insurance company in the Territory to pay a license of \$80 per annum. Cod. Sts. 585, § 1. In 1873, the act was amended by increasing the license from \$80 to \$150. The comma after the word "company" is omitted in the act as printed. It was the intention of the legislative assembly to increase the license of insurance companies, and not enable them by employing the same agent to avoid payment of taxes. If it clearly appears that it was intended to insert a comma after "company," this court in its construction should insert it. Sedgwick on Statutory Law, 230-3; *People v. Utica Ins. Co.*, 19 Johns. 358; *Smith v. People*, 47 N. Y. 336; Bacon's Abr., "Statutes;" *Smith v. Helmer*, 7 Barb. 420; *Murray v. N. Y. C. R. R. Co.*, 3 Abb. 342.

The court should examine other statutes of the same legislative body on the same question and construe them *in pari materia*. *In re Washington Park*, 52 N. Y. 137; *Tallman v. Syracuse R. R. Co.*, 4 Abb 351; *United States v. Freeman*, 3 How. (U. S.) 564.

If the comma is omitted, the sentence will be rendered meaningless and ungrammatical, and therefore it should be supplied by the court.

Another act of the same assembly in 1873 provides that this license shall be assessed against the companies and not the agencies. Sts. Ex. Sess., 1873, 133. This act may be examined in construing the statute in question.

I. B. PORTER, for respondents.

The words "insurance company" are descriptive of the agency required to pay license. This court cannot change the punctuation, but must ascertain what is contained in the statute. It cannot insert what has been omitted. Code Civ. Pr., § 612. This statute must prevail over any rule of construction not in harmony with it. The change in the act in 1873 was designed to encourage insurance companies to do business in this Territory. It is the right of every person to carry on a legitimate business. If the statute can be interpreted in two ways, it must be construed in favor of such right. Code Civ. Pr., § 620.

BLAKE, J. The court below rendered judgment upon the following facts, which were agreed upon by the parties. The appellant is the treasurer and collector of Lewis and Clarke county. The respondents are partners and agents of two foreign insurance companies, and refuse to take out a license to do business for each of said companies, but are willing to pay one license as general insurance agents. The court entered judgment that the appellant recover one license for all the business of the respondents. We are required to review this ruling.

The act concerning licenses, approved January 10, 1872, provided that there should be levied and collected a license tax "for each and every insurance company, agent or agencies transacting business in this Territory, the sum of \$80 per year." Cod. Sts. 585, § 1. This section was repealed by an act, approved May 8, 1873, which is as follows: "There shall be levied and collected by the tax collector a license tax \* \* \* for each and every insurance company agent or agencies, transacting business in this Territory, the sum of \$150 per year." We are called

upon to give the proper construction of the last law, under which the appellant claims that each agent of an insurance company must pay a license tax of \$150 per year in order to transact business for the company. We have examined the original statute, and find that the chief difference between these sections, which affects their interpretation, is in the punctuation. In the act approved in 1872, there is a comma after the word "company," and in the repealing act, there is no comma after this word in the same clause.

If this statute were ambiguous, doubtful or uncertain, and it were necessary to carry into effect the intention of the legislative assembly, we might insert the comma after the word, "company." But the language is plain and definite and there is no room for construction. *Smith v. Williams*, 2 Mon. 195; *Davis v. Clark*, id. 394. The license tax has been levied upon the business of the agent or agencies, regardless of the number of insurance companies for which he or they may be authorized to act. If the comma is inserted after the word "company," we would be compelled to hold that such an agent must pay a license tax for each insurance company that he represents. The Code of Civil Procedure prescribes the following rule for our guidance: "In the construction of a statute \* \* \* the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted." § 612.

We are aware of the rule that the punctuation of a statute or written instrument is entitled to slight weight in its construction. In *Ewing v. Burnet*, 11 Pet. 41, Mr. Justice BALDWIN says: "Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it." We have already stated that the meaning of the statute is clear without the comma; and if it had been omitted by the legislative assembly, we cannot insert it after the word "company," and thereby re-enact it.

*Judgment affirmed.*

## FREDERICKS, respondent, v. DAVIS, appellant.

**FRAUDULENT CONVEYANCE—*estoppel*.** The grantor in an alleged fraudulent conveyance, with a full knowledge of the facts, is estopped from testifying, against his own warranty of title, that the same is fraudulent and void. *Phillips v. Wooster*, 36 N. Y. 414.

**AUTHENTICATION OF OFFICIAL CHARACTER—*deputy*.** The certificate of a deputy county recorder to the official character of an acting justice of the peace, taking a deposition under a commission with a general power to any acting justice to execute the same, must be tested by the laws of the Territory where taken, and so tried is as good as if made by the recorder in person.

**ASSIGNMENT OF ERRORS—*instructions—receiving verdict*.** If errors in instructions given by the court below are relied on, the same must be specially noticed in exceptions taken or they will be disregarded. Objections to the form of receiving the verdict of a jury can only be considered by the appellate court when saved by proper bill of exceptions.

*Appeal from First District, Gallatin County.*

THIS cause was tried in the court below by BLAKE, J.

CHUMASERO & CHADWICK, for appellant.

The deposition of Myers was improperly admitted. The notice of application for a commission did not specify the time. The title of the case was incorrectly given. It was not taken by the party to whom the commission was issued; does not show that the witness was sworn in the case; does not show the official character of the person taking it; is not attested by an official seal.

The deposition of Drew should have been ruled out. It was not taken by the person to whom the commission issued, and the official character of the officer taking it is only attested by one who assumes to be a deputy recorder.

The deed from Drew to plaintiff was improperly admitted. It was not acknowledged as required by law. Cod. Sts. 396. See §§ 3, 6, 7, 21.

The court erred in refusing to admit the testimony of Davis as to the fraudulent character of the conveyance made by him to plaintiff. The declarations of W. A. Fredericks and W. H. Drew, while owning the property, should have been admitted.

So, too, should the letters offered in evidence. The consideration named in a deed may always be inquired into.

Some of the instructions given were too strong.

The court erred in receiving the verdict of the jury during an interval of adjournment without notice to the parties.

JOHNSTON & TOOLE and SHOBER & LOWRY, for respondent.

The deposition of Myers was properly admitted. It was taken in accordance with the special law of the eighth session, 1874, p. 49, § 1. Proof of service of notice and interrogatories was made in open court on one of the attorneys of defendant. The parties were sufficiently described; the deposition was taken by one duly authorized and is properly certified.

The deposition of Drew was properly admitted. It was taken under a lawful commission, and the certificate of a deputy recorder is sufficient. Harston's Pr. 262; 25 Cal. 184; 36 id. 202.

Davis could not question the deed from Drew to plaintiff.

Nor could he impeach his own conveyance to plaintiff.

The letters of Fredericks and Drew were only admissible for the purpose of impeachment as ruled by the court.

The instructions given by the court were in accordance with the law, and no exceptions were taken from them or to the manner of receiving the verdict of the jury, such as an appellate court can take notice of.

WADE, C. J. The plaintiff brings this action for partition and accounting, alleging that she is tenant in common with the defendant Davis, and the owner of an undivided one-half of a certain flouring mill and premises situate in the upper Willow creek valley, Gallatin county; that she has expended large sums of money in improving, repairing and operating the same; that defendant Gilbert, as her mortgagee, holds a lien thereon; that the same cannot be partitioned; whereupon she asks for a sale thereof; for an accounting between herself and Davis; and for a distribution of the proceeds of sale according to the respective rights, liens and interests of the parties. The defendant Davis admits that he is the owner of the undivided one-half of the property, but denies that the plaintiff has any interest therein,

and avers that W. A. Fredericks, the husband of the plaintiff, is his co-tenant, and the owner of an undivided one-half thereof; charges that the title of plaintiff and the mortgage to Gilbert are fraudulent and void, taken and given to hinder, delay, and defraud creditors, at the instance of W. A. Fredericks, the real owner; and for a cross-complaint alleges that W. A. Fredericks at the time of the erection of said flouring mill and prior thereto was greatly indebted to this defendant, for which the defendant secured a lien upon Fredericks' interest in the mill by commencing a suit against him and levying an attachment thereon; whereupon he asks that the mortgage to Gilbert and the conveyance to the plaintiff be declared null and void; for an accounting between himself and Fredericks, and prays that the property be sold and the proceeds brought into court to await the order of distribution thereof.

A brief statement of the facts is necessary to present the questions raised on this appeal. It appears that prior to July 1, 1871, Davis held the title to a certain saw-mill situate near Bozeman, Gallatin county, an undivided one-half of which, he says, he held in trust for W. A. Fredericks, the owner, the plaintiff and W. H. Drew declaring that Fredericks had no interest therein. Be this as it may, on that day, by a conveyance or bill of sale in writing, Davis sold and conveyed to the plaintiff and W. H. Drew the said saw-mill for the sum of \$2,000, together with all the privileges and appurtenances thereto belonging, agreeing to warrant and defend the title to the property so sold, which instrument of conveyance was duly recorded in Gallatin county records.

It further appears that on the 30th day of July, 1871, Davis and W. H. Drew entered into a contract in writing for the construction and erection of a flouring mill in the upper Willow Creek valley; that pursuant to the terms thereof, such mill was erected, and that each of said contracting parties became the owner of an undivided one-half interest therein and the rights, privileges and premises thereto belonging. W. A. Fredericks was a millwright and worked for Drew in the construction of the mill, and subsequently, upon its completion leased Davis'

interest, and took charge of the business of manufacturing flour therein. On the 30th day of March, 1874, the plaintiff sold her interest in the saw-mill to Drew for \$2,000, receiving in payment certain notes and securities, and at the same time Drew sold to plaintiff his interest in the flouring mill for the sum of \$2,000, which sum he and the plaintiff both say was paid in cash at the time of the sale and purchase, which sale was duly evidenced by a deed of conveyance, duly executed by Drew and wife to plaintiff, and recorded in the county records. After the plaintiff had thus acquired Drew's interest in the mill, W. A. Fredericks, her husband, continued the business of manufacturing flour therein until the expiration of his lease from Davis, and subsequently thereto, the plaintiff brings this action for partition, basing her right and title to the undivided one-half of the mill and premises upon the deed thereof from Drew and wife to herself.

Davis attacks this conveyance by alleging that W. A. Fredericks was the owner of the undivided interest in the saw-mill, and that the same was conveyed to the plaintiff to hinder, delay and defraud creditors, and that the plaintiff traded her interest in the saw-mill thus acquired to Drew for his interest in the flouring mill, whereby her title to the flouring mill became fraudulent and void.

On the trial the defendant Davis, for the purpose of showing that his bill of sale and conveyance of the undivided one-half of the saw-mill to the plaintiff was fraudulent and void as against creditors, offered to prove the consideration for such conveyance; that the same was paid by W. A. Fredericks, the husband of plaintiff, to whom he offered to convey, but was directed by the husband to convey to his wife, the plaintiff; the declaration of the husband that the property belonged to him, and also declarations of the wife to the same effect. This testimony was excluded and its exclusion is assigned as error.

In order to appreciate fully the nature of the evidence thus sought to be introduced, it should be further stated that Davis had previously testified that W. A. Fredericks was the real owner of the undivided one-half of the mill conveyed by him to plaintiff; that Davis was the trustee of Fredericks, holding this title

for him ; that at the time of this conveyance Fredericks was largely indebted to Davis and others, and was insolvent. He offers further to prove not only that Fredericks was the real owner of the property, but that he paid the consideration therefor mentioned in the bill of sale.

It therefore appears that Davis, at the time of the conveyance to plaintiff, knew that she had no interest in the property conveyed, and that as to the creditors such conveyance was fraudulent and void, and with this knowledge he promised to warrant and defend her title to the property.

In view of these facts, was the testimony offered in behalf of Davis properly excluded ? If the sale was fraudulent, Davis helped to perpetrate the fraud, and with a full knowledge of all the facts. Could he under such circumstances impeach his own conveyance by which the fraudulent sale was executed ? Having promised to warrant and defend the title of plaintiff, could he attack his own conveyance to show such title fraudulent and void ?

The mere asking of these questions suggests the inevitable answer they must receive. No man can be allowed to take advantage of his own wrong. Davis with a full knowledge of all the facts promised to warrant and defend a title that he knew to be fraudulent, and he cannot now be heard to declare the fraud in order to set such title aside. He cannot impeach his own deed. He cannot falsify his own warranty. So far as he is concerned the title of the plaintiff in the saw-mill after his bill of sale, conveyance and warranty was perfect. This doctrine is supported by the case of *Phillips v. Wooster*, 36 N. Y. 414, wherein the court says : " The position which the plaintiff occupies in relation to the transaction complained of as fraudulent, excludes him from alleging the fraud, or claiming any benefit against it. The conveyance against which he now seeks to derive advantage from the property was made by himself, with a full knowledge of all the facts as they existed at the time, as we are bound to presume, since he has shown nothing to the contrary. So that if the money paid was the debtor's, as he now insists it was, and the conveyance to the wife therefore

fraudulent as against creditors, it was not fraudulent as against him, for he was not only consenting to the act, but himself performed it." And so, if the money paid for the saw-mill was the money of W. A. Fredericks, and the conveyance to his wife therefore fraudulent as against creditors, it was not fraudulent as against Davis, for he was not only consenting to the act, with full knowledge of all the facts, but himself performed it. See, also, *Gales v. Mowery*, 15 Gray, 564; *Dodge et al. v. Freedman's S. & T. Co.*, 93 U. S. 383; *Harvey v. Varney et al.*, 98 Mass. 118.

The proposed testimony was properly excluded. In another view of the case, the testimony was immaterial. Admitting that the conveyance of the saw-mill from Davis to the plaintiff was fraudulent, and that Davis stood in a position to take advantage of the fraud, there is nothing in the case to impeach or in any manner to invalidate the conveyance from Drew to the plaintiff of his undivided one-half interest in the flouring mill whereby she became a tenant in common therein with Davis and entitled to demand partition thereof. The plaintiff, Drew and Fredericks, all testify that the plaintiff from her own separate funds paid to Drew \$2,000 in cash for his interest in the flouring mill, and there is no attempt on the part of Davis to contradict this testimony. And so the transactions in relation to the saw-mill, however fraudulent they might have been, became wholly immaterial, because not in any way connected with the plaintiff's acquisition of title to the flouring mill.

2. The defendant, Davis, attacks the deposition of W. H. Drew, because the official character of the justice of the peace before whom the same was taken in Arizona is authenticated by the certificate of a deputy county recorder, and not by the recorder himself. This certificate does not come within the purview and is not controlled by the act of congress in relation to the authentication and proof of records, etc., in the different States (R. S., § 906), nor by our own statute as to affidavits taken before a judge of a court of another State or foreign country (Cod. Sts, 130, § 476), but is controlled by the statutes of Arizona, to which we must look to determine its validity. The

statute of Arizona (Com. Laws, 56, § 8) requires each justice of the peace, before entering upon the duties of his office, to file his official bond with the county recorder. The Arizona statute also provides, that the recorder of each county may appoint a deputy recorder, and makes the recorder and his sureties responsible for the faithful performance of his duties by such deputy.

The act does not define the authority or point out the duties of the deputy recorder, and in such a case the deputy duly appointed and qualified may perform any act that his principal might legally perform. "In general, has power to do every act, which his principal might do." 1 Bouv. L. D. 463. See, also, *Emmal v. Webb*, 36 Cal. 197; *Muller v. Boggs*, 25 id. 184; Harst. Pr. 267.

The certificate authenticating the official character of the justice of the peace, before whom the deposition was taken, was properly made under the laws of Arizona by a deputy recorder. The commission was issued to J. Logan, *or any acting justice of the peace* of Mohave county, Territory of Arizona, and the deposition was taken by R. R. Baker, a justice of the peace of said county, at the time and place named. The officer so taking the deposition had authority under the commission to take the same, and the objection that the deposition was not taken by J. Logan was properly overruled.

The depositions of George L. Kent and Wm. H. Myers, appear to have been taken in pursuance of notices properly served.

Counsel for the defendants say that the court erred in giving to the jury the several instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, and also in refusing to give instructions asked for by Davis and numbered 1, 2, 3, 4, 5, 6, but they do not deign to point out the error complained of, nor to give any reason for their apparently confident assertion thereof. And we would be entirely justified in concluding that they had no reason to give and that they indulged the hope that the court would be able to discover error where they had failed to do so. We have been as unsuccessful as counsel in discovering any errors in the instructions, and all the questions that might have been raised thereon have been substantially disposed of in the first subdivision of this

opinion, in passing upon the admissibility of the evidence therein mentioned.

Davis objects that the deed from Drew to plaintiff of his undivided interest in the flouring mill was not properly acknowledged. If such were the fact, the creditors of Drew or the grantees of the plaintiff might object, but Davis does not stand in a position to do so. He cannot raise the question.

If W. A. Fredericks is not his co-tenant in the mill and the owner of an undivided one-half thereof, then his defense entirely fails, and it is wholly immaterial to him, and is a matter about which he cannot inquire in the action under his answer, as to who is the owner of such undivided one-half of the mill. If Fredericks is not the co-tenant of Davis in the mill, then so far as Davis is concerned, it is a matter of no consequence in this action who is such co-tenant. As to the reception of the verdict, there is nothing in the transcript to show that it was not received in open court, in regular form, after the names of the jurymen had been called by the clerk.

No exception was saved as to the manner in which the verdict was received, and we are not called upon to express an opinion upon alleged errors to which no exceptions were taken. Judgment affirmed with costs.

*Judgment affirmed.*

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FREDERICKS, respondent, v. CLARK ET AL., appellants.

**FINDINGS AND ISSUE.** Where the property of a wife is attached as that of the husband, on the allegation that the wife's ownership is fraudulent as against creditors, and upon trial before the court the finding is that the property belongs to the wife as a sole trader, *held*, that such finding fully covers the issue of fraud.

**JUDGMENT—*appeal.*** An appeal to the supreme court does not suspend the operation of a judgment, so that it may not be plead as a bar in another case pending between the same parties in interest concerning the same subject-matter. See *Curtis v. Donnell et al.*, ante, p. 211.

**TESTIMONY—*cross-examination.*** A defendant may not be allowed to make out his own case by cross-examination of plaintiff's witnesses unless the examination in chief has opened the door.

*Appeal from First District, Gallatin County.*

THIS cause was tried in the court below by BLAKE, J.

SAMUEL WORD, for appellants.

The court below erred in not finding directly upon the issue of fraud tendered by the answer and replication. *Farrar v. Lyon*, 19 Mo. 122; 10 Cal. 411.

The court failed to find amount of property taken, only the value. 30 Cal. 419.

The findings should cover all the issues and be of facts, not legal conclusions. *Bates v. Bower*, 17 Mo. 550; 20 id. 262; 24 id. 343.

The court erred in admitting the record in case of *Fredericks v. Clark & Davis*, pending an appeal to the supreme court, wherein no final judgment had been rendered. 33 Cal. 474.

The court departed from the usual custom in disallowing the defendant to cross-examine plaintiff's witnesses. 14 Cal. 18.

E. W. TOOLE and J. H. SHOBER, for respondent.

The issue of fraud was fully covered by the finding of the court.

Defendants did not request a finding of the value of the property attached in accordance with section 220 of the Civil Practice Act, but the court did so find on its own motion.

The question of the ownership of the mill was immaterial to the case, but as defendants were allowed to go into the same, it was competent for plaintiff on rebuttal to offer the records of the court in which this question had been determined. *Freem.* on *Judg.* 291, 328; *Sayre v. Harpending*, 49 Barb. 166; *Haines v. Hammond*, 18 How. 123; *Burton v. Burton*, 28 Ind. 343; 16 id. 107; *Banks v. Wheeler*, 28 Conn. 433; *Curtis v. Beardsley*, 15 id. 518.

Davis conveyed to plaintiff the property exchanged for the flouring mill and advised her to get papers as a sole trader. 52 Barb. 26; 4 Conn. 406; 3 Johns. Ch. 354; 5 Wend. 661.

The judgment given in evidence was between the same parties in interest. *Lomme v. Sweeney*, 1 Mon. 584; 4 Otto, 351.

Plaintiff was in possession at the time of seizure. This was all that was necessary for her to show. 3 Barb. 110.

The cross-examination sought by defendant was improper. The full benefit of the same was had on rebuttal.

WADE, C. J. The ownership of certain flour and lumber attached by the defendant Davis as the property of W. A. Fredericks, one of the plaintiffs, and replevied by Sarah J. Fredericks, wife of the said W. A., as her own separate property, is involved herein. This defendant, resting chiefly upon the allegation that W. A. Fredericks was the owner of the undivided one-half of a certain flouring mill; that for the purpose of hindering, delaying and defrauding his creditors, he caused the same to be conveyed to his wife, Sarah J.; that the flour and lumber in question were the profits and proceeds of such mill, after such conveyance, and therefore the property of the husband. And this claim of fraud in such conveyance having been set at rest in the case of *Fredericks v. Davis & Gilbert*, decided at this term (see *ante*, page 251) wherein it was finally determined and adjudged that Sarah J. Fredericks, by virtue of the conveyance aforesaid, became the *bona fide* owner of the undivided one-half of said mill, and as such owner, entitled to partition thereof, there is not much left to try in this action.

The case was tried by the court without a jury, and one of the errors complained of by the defendant is that the findings of fact do not cover the issue of fraud raised in the pleadings. Undoubtedly the findings should be as broad as the issues. The defendant having charged that the plaintiff Sarah J. Fredericks held and claimed the property mentioned in the complaint, in order to cover it up, and for the purpose of cheating and defrauding the creditors of her husband, and the court having found that said Sarah J. was the owner of the property as sole trader and that the same was wrongfully seized by the defendant Clark, sheriff, as the property of her husband, at the suit of Davis, we do not see but the finding is as broad as the issue and conclusively covers the question of fraud raised in the pleadings.

2. The case of *Fredericks v. Davis & Gilbert*, wherein title to

the mill property had been adjudged, was determined in the district court, and an appeal to the supreme court pending therein, when the pleadings, record and judgment-roll in that case were admitted in evidence in this one, to rebut the attack of the defendant on the title of plaintiff. Such admission is assigned as error. If this had been error it is not such an one as ought to reverse the case, for since the affirmation in the supreme court of the judgment so introduced, whereby upon a second trial such judgment would become competent evidence, a reversal of the case would work no advantage to the defendant.

But we do not think that an appeal may be considered as suspending the operation of a judgment, so that it is not admissible as evidence in any controversy between the parties. Until reversed or annulled, the judgment is binding upon the parties as to every question directly decided, and an appeal with a proper bond to stay proceedings only suspends the right to execution. "If the appeal is in the nature of a writ of error, conferring power on the appellate court to determine such errors as may have occurred on the trial, or in the decision of the cause, and giving the court, upon such determination, no other authority than that of reversing, modifying, or affirming the judgment of the inferior court, and of remitting the case back to the tribunal whence it came, that such tribunal may conform its judgment and proceedings to the views of its superior, then the judgment appealed from does not, until vacated or reversed, cease to operate as a merger or bar." Freeman on Judgments, § 328, and cases cited.

There was no objection to the judgment, because it was not between the same parties, nor could such objection have been made, for it was between the same parties in interest, and determined the title to the mill property as between W. A. and Sarah J. Fredericks, the very question that Davis sought, by his attack upon the title of Sarah J., to have tried again in this action.

3. The defendant, as often happens, sought to make out his defense on the cross-examination of plaintiff's witnesses. The refusal to permit this, where the examination in chief had not opened the door, was not error.

Even if the defendant had been entitled to the proposed cross-examination of Sarah J. Fredericks, he was not in any manner injured, for when she came again to the witness-stand in rebuttal, the examination took place, and judging from her testimony, covered all the questions proposed upon her former examination.

The judgment is affirmed with costs.

*Judgment affirmed.*

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DAVIS, appellant, v. FREDERICKS ET AL., respondents.

WITNESSES — *proof of handwriting.* In this Territory the rule as laid down by the U. S. supreme court in *Strother v. Lucas*, 6 Pet. 767, must prevail, which establishes that a witness is not competent to testify as to the genuineness of a signature, who has no other knowledge thereof except that derived by a comparison with others acknowledged to be genuine. Even in States where such testimony is admissible by statute, the genuineness of the signature used as a standard of comparison must be established by a higher grade of evidence than the opinion of a witness.

*Appeal from First District, Gallatin County.*

THIS cause was tried in the court below by BLAKE, J.

CHUMASERO & CHADWICK, for appellants.

The testimony adduced by defendant to prove the genuineness of appellant's signature to the alleged receipts offered in evidence and relied upon to prove payment was incompetent, as the knowledge of witnesses was derived merely from comparison of handwritings. *Moore v. United States*, 1 Otto, 270; *Strother v. Lucas*, 6 Pet. 763; *Rogers v. Ritter*, 12 Wall. 321; *People v. Spooner*, 1 Denio, 343; *Titford v. Knott*, 2 Johns. 211; *Jackson v. Phillips*, 9 Cow. 94; 1 Greenl. on Ev., §§ 576, 582.

Even in States where statute has admitted such evidence, it is not applicable to prove the genuineness of the signature used as the standard of comparison. *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 id. 315; *Com. v. Eastman*, 1 Cush. 217. The other points made by appellant were not considered by the court.

E. W. TOOLE and J. H. SHOBER, for respondents.

The court below adopted the true rule as to the admission of evidence to prove the genuineness of the signatures.

No objection was made in the court below as to genuineness of Davis' signature to the letters used as standard of comparison ; had this been done respondents could have made the proof ample by the highest grade of evidence.

The other points covered by the brief were not considered by the court in rendering its opinion.

WADE, C. J. This is an action upon a promissory note bearing date the 12th day of March, 1868, given by the defendants to plaintiff for 27½ oz., 5 pwts. and 14 grains of gold dust, payable on or before the first day of the following July. The defendants admit the execution of the note and aver payment. In order to maintain their defense they offer in evidence the following receipt :

“GALLATIN CITY, *Sept.* 13, 1869.

Received of W. A. Fredericks \$1,415.38, being in full of the within claims and all demands to date.

(Signed)

A. J. DAVIS.”

Also a copy of the following, after showing loss of original.

“GALLATIN CITY, M. T., *Sept.* 11, 1868.

W. H. DREW, Esq.:

The note which I hold against you and W. A. Fredericks is paid and I shall not hold you further answerable for said amount.

(Signed)

A. J. DAVIS.”

Davis denied the execution of these papers and said they were false and forged. One of the main questions presented on this appeal arose over the admission of evidence in proof of the handwriting and signature of Davis. Many witnesses were called for this purpose, and among them, A. J. Malin, who testified as follows: “I am the county clerk and recorder, I never saw Davis write, or saw his handwriting till last term of this court,

when I was called to compare the receipts with 15 or 20 letters. Edwards said the letters were received from Davis. I found the receipts resembled the handwriting of Davis; I would say they were Davis' or some one's who could imitate his handwriting." The testimony fairly raises the question, whether it is competent to call a witness to give an opinion to the jury, founded on a comparison, without any personal knowledge of the actual handwriting of the party whose signature is in controversy. The decisions in the different States upon this question have been conflicting, but in the supreme court of the United States, the decisions of which are controlling authority here, it has been uniformly held that this kind of testimony is incompetent, as a reference to the following cases will show. In the case of *Strother v. Lucas*, 6 Pet. 767, in the course of the trial certain depositions were offered in evidence, which among other things went to prove the handwriting of a witness to a deed, by comparing the handwriting of the witness with the handwriting of entries made in a certain register of marriages and interments alleged to have been made by the witness. The depositions, so far as they went to prove the handwriting of the witness to the deed by comparison, were rejected, and the court in sustaining the decision says: "It is a general rule that evidence by comparison of hands is not admissible, where the witness has no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. There may be cases where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, comparison of handwriting with documents known to be in his handwriting has been admitted." But these, the court further says, are extraordinary instances arising from the necessity of the case, and do not apply where living witnesses may be examined as to the handwriting of the party.

In the case of *Rogers v. Ritter*, 12 Wall. 320, the same court says: "It is insisted in the second place that comparison of handwriting is in no case legal evidence, and as it was admitted to prove the genuineness of the disputed paper, the judgment should on that account be reversed. It is certainly true that the ancient

rule of the common law did not allow of testimony derived from a mere comparison of hands, and equally true that there has been a great diversity of opinion in the different courts of this country in relation to this species of evidence. But in England, this rule of the common law, as it respects civil proceedings, has been abrogated by the legislature, so that in the courts there at the present day, in civil suits, the witness can compare two writings with each other, in order to ascertain whether they were both written by the same person. It is, however, not necessary for the purposes of this case, to discuss the subject in all its bearings, nor to depart from the rule laid down by the court in *Strother v. Lucas, supra*, that evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands."

In the case of *Moore v. United States*, 1 Otto, 273, the court says: "The only question of importance, in this case, is whether the signature to the document bearing date December 17, 1863, and purporting to be executed by the claimant was properly proved. The court compared it with his signature to another paper in evidence for other purposes in the cause respecting which there seems to have been no question, and from the comparison adjudged and found that the signature was his. Had the court a right to do this, and determine the genuineness of a signature by comparing it with other handwriting of the party? By the general rule of the common law this cannot be done, either by the court or jury; and that is the general rule of this country, although the courts of a few States have allowed it, and the legislatures of others as well as of England have authorized it. \* \* \* But the general rule of the common law disallowing a comparison of handwriting as proof of signature has exceptions equally as well settled as the rule itself. One of these exceptions is that of a paper admitted to be in the handwriting of the party, or to have been subscribed by him is in evidence *for some other purpose in the cause*, the signature or paper in question may be compared with it by the jury." See 1 Wharton on Ev., § 712, note.

These authorities ought to be conclusive upon the question that evidence by comparison of hands is not admissible, where the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands.

Neither do we think that the testimony of the witness Malin meets the requirements of the law in those States where testimony by comparison of hands is admissible. In the case of *The Commonwealth v. Eastman et al.*, 1 Cush. 217, the court says: "Nothing but original signatures can be used as standards of comparison by which to prove other signatures to be genuine. Nor can a paper proposed to be used as a standard be proved to be an original and a genuine signature merely by the opinion of a witness that it is so; such opinion being derived solely from his general knowledge of the handwriting of the person whose signature it purported to be. The evidence resulting from a comparison of a disputed signature with other proved signatures is not regarded as evidence of the most satisfactory character, and by some most respectable judicial tribunals is entirely rejected. In this Commonwealth it is competent evidence, but the handwriting used as a standard must first be established by clear and undoubted proof, that is either by direct evidence of signature or by some equivalent evidence." Citing *Moody v. Rowell*, 17 Pick. 490; *Richardson v. Newcomb*, 21 id. 315.

Mr. Wharton, in his work on Evidence, vol. 1, § 709, speaking of this kind of evidence, says: "It is scarcely necessary to add that the writings from which the witness draws his opinion must be identified as those of the party whose writing is contested on the trial. It will not be enough that the witness obtains his knowledge from letters said to be genuine."

The testimony in the case fails to answer the rule here indicated. Six months before the trial, certain letters were handed the witness Malin, which Edwards, one of the attorneys of Davis, told him were received from and written by Davis. And thereupon he compared the receipts in question with the letters and arrived at the conclusion that the former were in the handwriting of Davis. Edwards was not called upon to prove that the letters had been received from or were written by Davis. So that the

witness, never having seen Davis write, and the letters received by him from Edwards being his sole standard of comparison, and there being no proof that they were the letters of Davis, it follows that his opinion, that the receipts were in the handwriting of Davis, was an opinion not warranted by the rules of law.

Entertaining these views, it is not necessary to discuss the other questions raised by the appellant.

Judgment reversed and cause remanded for a new trial.

*Judgment reversed.*

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KNOX, respondent, v. GERHAUSER, appellant.

STATUTE OF LIMITATIONS — *promissory note — residence of maker.* A. commenced this action against B. April 1, 1875, upon a promissory note made in California October 1, 1869, in which B. promised to pay one day after date a certain sum in gold coin, or its equivalent, with interest. The complaint alleged that A. and B. were residents of California when the note was made, that B. resided in Nevada from May 1, 1871, until June 1, 1872, when he removed to Montana; and that he has resided in this Territory since that time. B. moved to strike from the complaint these allegations and the motion was overruled. *Held*, that these allegations were material, and that the complaint without them would have stated a cause of action that was barred by the Statute of Limitations.

SAME — “*lapse of time*” in *California and Montana laws.* Under the laws of this Territory, an action which cannot be maintained in California upon said promissory note, by reason of the lapse of time, cannot be maintained in this Territory. The statutes of California provide that an action upon a promissory note must be commenced within four years, and that the time during which a person is absent from the State after a cause of action has accrued against him shall not be a part of the time limited for the commencement of the action. *Held*, that this action was not barred by the Statutes of Limitations of California or this Territory.

PLEADINGS GOVERN EVIDENCE. B.’s answer alleged that B. was a resident of California when the note was made. B. testified that he resided in Nevada when the note was made. *Held*, that this court must be controlled by the facts appearing in the answer.

PAYMENT OF PROMISSORY NOTE BY ORDER. Upon the trial, B. testified that when the note was made and delivered to A., he gave him also an order upon C. for the payment of the note; that a suit was then pending between B. and C.; that B. afterward had a settlement with C., who reserved the amount of the note; and that B. did not know what became of the order or the amount so reserved. A. testified that he received the order from B.; and that C. refused

to accept it and never paid it. *Held*, that the acceptance of the order by A. did not extinguish the note, unless there was an express agreement between A. and B. that it should be received as payment. *Held, also*, that it was the province of the jury to determine whether the order was taken by A. in absolute payment of the note, or as collateral security.

RETURN OF ORDER BEFORE JUDGMENT. A. did not account for the foregoing order, or offer to return it to B., or deliver it into court, before the entry of the judgment against B. upon said note. *Held*, that the judgment was properly entered without requiring the surrender of the order.

JUDGMENT IN GOLD COIN OR ITS VALUE. The jury assessed the damages of A. at \$743 in gold coin of the United States, or \$757.86 in legal tender treasury notes of the United States, the equivalent of the gold coin. The judgment was entered for the last-named sum. *Held*, that the judgment does not follow the verdict, and that the judgment should fix the amount to be paid, if paid in gold coin, and the amount to be paid, if paid in said legal tenders.

COSTS WHEN JUDGMENT IS MODIFIED. The appellant did not ask the court below to modify the judgment, and this court modified the same, upon its own motion, by prescribing the manner of satisfying it. *Held*, that the appellant cannot recover his costs of appeal.

*Appeal from Third District, Lewis and Clarke County.*

THIS action was tried before WADE, C. J., who entered a judgment for Knox.

H. R. COMLY and E. W. TOOLE, for appellant.

No judgment could be entered on the verdict under the laws of this Territory. The judgment does not follow the verdict. *Frohner v. Rodgers*, 2 Mon. 179.

The action is barred by lapse of time. The limitation upon promissory notes in California is four years, and appellant's absence from the State cannot be deducted therefrom, because he was not a resident thereof at the time of the execution of the contract, but a resident of Nevada. Civ. Pr. Act, § 580; Cod. Sts. 518, § 21; *Fletcher v. Spaulding*, 9 Minn. 64; *Thomas v. Black*, 22 Mo. 330; *Fike v. Clark*, 55 id. 105.

Appellant gave an order to respondent, and this was accepted and amounts to payment unless respondent shows that he gave notice of non-payment to appellant. No such notice was given. *Kephart v. Butcher*, 17 Iowa, 240.

Appellant was entitled to recoup \$600, which the insurance company retained when it settled with appellant, on account of

the order given to respondent by appellant. *Kephart v. Butcher. supra*, and cases cited.

Respondent retains the order given him by appellant, and does not account therefor. He cannot recover on this showing. 2 Am. L. C. 229; *Jones v. Savage*, 6 Wend. 658; *Dayton v. Trull*, 23 id. 345.

SANDERS & CULLEN, for respondent.

The verdict found so much due respondent and the judgment is for this amount. The finding as to coin might be deemed surplusage.

Appellant's residence, so that he has been absent from California, is not material. Appellant admits in the answer that he resided in California October 1, 1869, and cannot now be allowed to assert otherwise.

If the maker of a note resides in California four years, an action is barred by the Statute of Limitations. If he continues to reside outside of the State, after making the note, no lapse of time bars the remedy. Appellant did not reside in California after giving the note.

Appellant did not ask for damages in his answer and therefore could not recover any.

Appellant did not plead that he gave an order to respondent in payment of the note. He alleged an absolute payment in money to respondent. The proof does not support the answer. The vital fact is the payment to respondent which is unproved. *Griffith v. Grogan*, 12 Cal. 317; *Pomeroy on Rem.*, § 554.

The pleadings show that the parties resided in California when the note was made, and that appellant left forthwith and never returned. Respondent did not follow him up and re-deliver the order, and appellant cannot recover damages, which are not asked for in his pleadings. *Pomeroy on Rem.*, § 556; *Phillips v. Van Schaick*, 37 Iowa, 229; *Pier v. Heinrichhoffen*, 52 Mo. 333; *Johnson v. Moss*, 45 Cal. 515.

Appellant was required to prove that the insurance company did pay the order. *Pomeroy on Rem.*, § 564. The order can have no other effect than that of collateral security for the note.

It was neither appellant's own note, nor the note of a third party. *Clark v. Young*, 1 Cranch, 181; *Peter v. Beverly*, 10 Pet. 532; *Downey v. Hicks*, 14 How. (U. S.) 532; *Brown v. Spofford*, 95 U. S. 474.

The statute of Missouri is different from that of California, and the cases relied on by appellant are inapplicable.

The failure to enter a judgment for gold coin affects no substantial rights of appellant, and the judgment cannot be reversed therefor. Civ. Pr. Act, § 79.

H. R. COMLY and E. W. TOOLE, for appellant, in reply.

The evidence relating to the order was received upon the trial, and it is too late to object to its admissibility. The appellant's plea of payment was sufficient to admit it. If the parties stipulate to make the order a conditional payment, it is what the law makes it, and is admissible under the plea. 2 Am. L. C. 249-251; *Pomeroy on Rem.*, §§ 700, 701; *Byles on Bills* (6th ed.), 304. The conditional payment is a payment, unless respondent produces the order or gives notice of its non-payment to appellant, so that the latter would suffer no injury.

BLAKE, J. The respondent commenced this action April 1, 1875, to recover the amount due on a promissory note, which was made at Sacramento, State of California, October 1, 1869, and in which the appellant promised to pay to the order of the respondent, one day after date, \$422.64 in gold coin of the United States, or its equivalent, with interest at the rate of one and one-half per centum per month. The case was tried by a jury and judgment was entered on the verdict in favor of the respondent. We will examine the questions that have been discussed by counsel.

The respondent filed an amended complaint May 10, 1875, which contained a number of allegations in addition to those which would be sufficient to support a judgment in ordinary causes for the owner of a promissory note. The following facts were stated in them: That the appellant at Helena, March 1, 1875, promised to pay the note; that the appellant and respondent were residents of the State of California, when the note was executed and delivered; that the appellant removed to the State

of Nevada, May 1, 1871, and continued to reside there until June 1, 1872, when he removed to Montana; that the appellant has resided in Montana since June 1, 1872; and that this action was not barred by the Statute of Limitations of said Nevada and Montana.

The appellant filed a motion to strike from the complaint these allegations because they were "irrelevant, immaterial and redundant." The motion was denied and the appellant contends that this ruling is erroneous. Under the Civil Practice Act, "if irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the court on motion of any person aggrieved thereby." Civ. Pr. Act, § 65. The original complaint and the orders that were made in the action before the amended complaint was filed might aid us in passing upon this question, but they do not appear in the transcript. We infer that these facts have been pleaded for the purpose of showing that the Statute of Limitations of this Territory did not defeat the action. Without these allegations, the complaint would be held insufficient on the ground that the action was barred by that statute. The pleadings should allege the facts concerning the residence of a party within this Territory or his absence therefrom, which take the subject of the action from the operation of the Statute of Limitations. *Smith v. Richmond*, 19 Cal. 481; *Chabot v. Tucker*, 39 id. 434; *Bass v. Berry*, 51 id. 264. The exceptional matters, which have been mentioned, were not irrelevant, immaterial or redundant and the action of the court on the motion was correct. The allegation that the action is not barred by the Statutes of Limitations of Nevada and Montana is a conclusion of law and the motion of the appellant to strike it from the complaint should have been sustained. But this error in the proceedings does not affect the substantial rights of the parties and the judgment cannot be reversed on account of it. Civ. Pr. Act, § 79.

The answer admitted the execution of the note, and that the appellant and respondent were residents of the State of California when it was executed. It alleged that the appellant removed to Nevada October 10, 1869; that he re-

sided there until the month of May, 1870; and that he has been a resident of Montana since May, 1870. At the trial these facts, with one exception, which will be pointed out in this opinion, seem to have been established without any controversy, and the parties differed respecting the principles of law that should be applied to them. It is not necessary to refer to all the exceptions of the appellant to the instructions which were given and refused by the court, and the rulings upon the admission of evidence, that are determined by an examination of the Statute of Limitations of California. The appellant insists that the court erred in holding that the action was not barred by this statute. The following sections of the laws of this Territory govern the case. "When a cause of action has arisen in another State \* \* \* and by the laws thereof an action thereon cannot be there maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this Territory" \* \* \*. Civ. Pr. Act, § 580. "When the cause of action shall have arisen in any other State \* \* \* and by the laws thereof an action cannot be maintained against a person by reason of the lapse of time, no action thereon shall be commenced against him in this Territory." Cod. Sts. 518, § 21. The laws of the State of California, which affect the parties, provide as follows: "If when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the time herein limited, after his return to the State, and if after the cause of action shall have accrued, he depart the State, the time of his absence shall not be a part of the time limited for the commencement of the action." "An action upon any contract, obligation or liability founded upon an instrument of writing" must be commenced within four years. 2 Hittell's Laws of California, 633. It is maintained by the counsel for the appellant that this action is barred under the laws of this Territory "by reason of the lapse of time," as the limitation upon promissory notes in the State of California is four years; that the period during which the appellant was absent from California cannot be deducted because he was a resident of the State of Nevada when

the note was executed; and that the appellant resided in Montana more than four years prior to the commencement of this action. The appellant testified as follows upon the fact of his residence: "I resided in Nevada when the note was given and plaintiff (Knox) resided in California." The answer, which is verified by the appellant, "admits that said note was made and executed in the State of California, and whilst plaintiff and defendant were residents of said State; \* \* \* and avers that he (Gerhauser) moved to said last-mentioned State (Nevada) on or about the 10th day of October, A. D. 1869 \* \* \*." This argument is based upon the assumption of the fact, relating to the residence of the appellant in the State of Nevada when the note was made, which is in conflict with the admissions and averments of the answer. The decision of this court must be controlled by the fact which is stated in the answer. *Fisk v. Cuthbert*, 2 Mon. 593.

We think there is no difficulty in the application of the statutes to these facts. The law of the State of California, which requires an action upon a contract to be commenced within four years, is enforced against the residents thereof, during said term of four years and is not applicable to this case because the appellant has not returned to the State since October 10, 1869, and has resided elsewhere. The appellant departed from the State of California after this cause of action accrued, and the law is plain that "the time of his absence shall not be a part of the time limited for the commencement of the action." The lapse of time during this period of the absence of the appellant from the State of California is immaterial. The statute does not define its effect by prescribing any number of years. The supreme court of California has examined this provision. *Palmer v. Shaw*, 16 Cal. 93; *Rogers v. Hatch*, 44 id. 280. In the last case, it is held that the successive absences of a person from the State must be aggregated together and deducted from the whole time which has elapsed since the cause of action accrued, and the remainder is the time the Statute of Limitations has run. The court below interpreted these statutes correctly in its instructions.

The next matter for our consideration is the testimony respect-

ing the payment of the note by the appellant. The answer contains this allegation: "And the said defendant, for further answer, says that he left and deposited the money to pay off and discharge said note at its maturity with certain parties at the place whereat said note was given and payable, and that he is informed and believes and therefore charges that the said note and the whole thereof was duly paid off and satisfied." This allegation was denied by the respondent in his replication. At the trial, the appellant testified that, at the time the note was made, he gave an order upon the North British Insurance Company for the payment of the note to the respondent; that "it was one transaction;" that a suit was then pending between him and the company in which he claimed that the company owed him; that he settled with the company in 187- and the amount of the note, \$600, was reserved out of the sum that was due to him; that he did not know what was done with the order on the amount so reserved; that the respondent was to be satisfied if the insurance money was paid; and that it was agreed between the respondent and a man who acted for the company that the amount of the note was to be paid to the respondent, if the company paid it. The respondent testified in his deposition that the appellant gave him the order; that the company refused to accept it; and that no payment had been made on the note. W. C. Child testified that he called upon the appellant in 1872, and presented the note for payment; that the appellant said he did not have the money but would pay it soon; and that the appellant wanted to settle this and other demands against him then held by Child at forty cents on the dollar. The appellant testified that Child never presented this note to him and that nothing was said about it. No other testimony was offered by the parties in relation to this subject.

The appellant claims that the court erred in its instructions; that his defense of payment was established by the evidence; that the respondent was required to prove that he presented the order to the company for acceptance and gave notice of its non-acceptance to the appellant; that the respondent could not recover in the action without accounting for the order; and that

the appellant was entitled to recoup the \$600 so reserved by the company, as damages.

The note was never surrendered by the respondent, and the burden of proving that it had been paid rested on the appellant. The foregoing testimony, respecting the nature of the transaction between the appellant and respondent, and the execution and delivery of the note and order, was admitted on the trial without any objection, and the instructions of the court were based upon it. We will therefore assume that these facts were properly before the jury and express no opinion upon the right of the appellant to prove them under the pleadings or make this defense.

The contracts which have been referred to were made and to be performed in California, and their construction must be governed by the law of that State. The decisions of its courts have been uniform in every case in which the question has been discussed. In *Brown v. Olmsted*, 50 Cal. 165, Mr. Justice NILES says: "This court has repeatedly recognized the rule that an express agreement must be shown to establish the fact that a bill or note of either the debtor or a third person was taken by the creditor in payment of a pre-existing debt." *Brewster v. Bours*, 8 Cal. 506; *Griffith v. Grogan*, 12 id. 320; *Welch v. Allington*, 23 id. 322. This doctrine is supported by many authorities. 2 Pars. on Notes and Bills, 185, and cases there cited; 2 Am. L. C. (4th ed.) 242, and cases there cited; *Kephart v. Butcher*, 17 Iowa, 240, and cases there cited; *Downey v. Hicks*, 14 How. (U. S.) 240. In *Peter v. Beverly*, 10 Pet. 568, Mr. Justice THOMPSON cites with approval the case of *James v. Hackley*, 16 Johns. 277, in which the same principle is "well and succinctly laid down," and says: "It is unnecessary in the present case to carry the principle so far as to say there must be an express agreement for that purpose, in order to operate as payment; but the evidence must certainly be so clear and satisfactory as to leave no reasonable doubt that such was the intention of the parties." We are of the opinion that the acceptance of the order by the respondent did not extinguish the note unless it was expressly agreed that it should be received as payment. If the order was de-

livered and received as an absolute payment and discharge of the note, this action cannot be maintained.

It was the province of the jury to ascertain from the evidence the intention of the parties and determine whether the order was taken by the respondent in absolute payment of the note or as collateral security only. *Lyman v. U. S. Bank*, 12 How. (U. S.) 244; *Bonnell v. Chamberlin*, 26 Conn. 487; *Horner v. Hower*, 49 Penn. St. 65; *Connecticut T. Co. v. Melendy*, 119 Mass. 449. The jury must have been satisfied that the order was delivered as a conditional payment or collateral security of the note, and we think that it cannot be claimed that this finding is against the evidence. If we concede that the testimony is conflicting in this matter, we cannot disturb the verdict.

The appellant contends that the respondent was not entitled to his judgment until he had accounted for the order or offered to return it. The payment of the order, which was given in 1869, depended upon the success of the appellant in the prosecution of his suit against the North British Insurance Company, and it appears that this litigation was not finally decided until 1872 or 1873. The order was not accepted or paid by the company, and the appellant within a few days after its delivery to the respondent ceased to be a resident of the State of California.

The appellant relies on the following cases: *Jones v. Savage*, 6 Wend. 658; *Dayton v. Trull*, 23 id. 345; *Kephart v. Butcher*, 17 Iowa, 240. In *Jones v. Savage*, *supra*, the action was on a bill of exchange which had been given for goods, and it was held that unless due diligence was used to obtain payment upon the bill, the original debtor was discharged, and Mr. Chief Justice SAVAGE says: "It may be that the holder of the bill, when it fell due, made it his own, by omitting to demand payment and give notice. It may be that the defendant had funds in the hands of the drawee, with which it would have been paid if presented." In *Dayton v. Trull*, *supra*, it was held that a draft or bill of exchange upon a third person, given in full satisfaction of a judgment when paid, is *prima facie* evidence of the payment of the judgment; and that the creditor must show in an action on the judgment, diligence in obtaining payment of the

bill, and if not paid, notice of non-payment, or excuse the non-presentment and produce the bill on the trial to be canceled. Mr. Justice BRONSON says: "The defendant had a right to presume that the bills would be presented, and if he received no notice of their dishonor, he would naturally conclude that his funds in the hands of the drawee had been applied in satisfaction of his debt to the plaintiff." In *Kephart v. Butcher*, *supra*, the court holds that the creditor who has taken the note of a third person for a pre-existing debt is not debarred from resorting to the original consideration, although he has not presented the instrument or given notice of its dishonor, provided that he can show that the debtor has not, in consequence of such omission, sustained any injury. In this case Mr. Justice DILLON reviews the authorities and concludes that actual loss or prejudice is the true test of the right of the creditor to fall back upon the original consideration.

The respondent did not receive from the appellant a bill of exchange or the note of a third party, and the cases which have been cited by the appellant are not applicable to the order in controversy. In *Jones v. Savage*, *supra*, the court assumed that the drawee had funds for the payment of a bill which had not been presented. In the case at bar, we know that the order was drawn on a fund which did not exist until a number of years afterward. In *Dayton v. Trull*, *supra*, the court held that a party could presume that his money in the hands of the drawee had been applied on his bills if there had been no notice of dishonor. In the case at bar, the facts repel this presumption in favor of the appellant. The respondent did not injure the appellant by presenting the order to the company that declined to accept it, and we are unable to see any legal reason for the failure of the company to pay to the appellant the amount which is mentioned in the order at the time of the settlement between them.

In *Crawford v. Cully*, Wright, 453, an order was drawn by a party on an attorney at law with whom he had left some demands for collection, when the attorney had paid more than he had collected. Mr. Justice WOOD said: "The paper offered is not a bill of exchange, or subject to the law merchant governing bills.

It is a mere order by a client upon his attorney to pay over money which he had collected ; an order on a contingent fund. The attorney had no money to pay over. \* \* \* The drawee of such an order could not claim to be exonerated, because he had not notice in time." In *Hoar v. Clute*, 15 Johns. 224, it is held that an order, not negotiable, for the payment of money, which has not been paid or accepted by the drawee, is not a payment or extinguishment of a precedent debt.

In *Clark v. Young*, 1 Cranch, 181, the court decided that it was not necessary to prove an offer to return a note before an action was commenced on the original debt. In *Rogers v. Shelburne*, 42 Vt. 550, it is held that the taking of an order for the payment of a demand does not impair the right to sue on the original debt, although the order is not produced in court on the trial. We think that the respondent was not required to notify the appellant that the order had not been accepted by the company, with which he had no funds. It was not necessary for the respondent to return the order to the appellant before the judgment was entered, because it was of no benefit to either party and could not affect any rights in this action. The respondent is not liable for the conduct of the insurance company in withholding any sum from the appellant at the time of the settlement of the litigation between the parties, and the court below properly refused to allow the jury to assess any damages against the respondent on this matter.

This branch of the case may be determined by an examination of the following rule, which is well settled by the authorities that are referred to in *Brown v. Spofford*, 95 U. S. 482, by Mr. Justice CLIFFORD, who says: "Parol evidence of an agreement, made contemporaneously with a promissory note which contains an absolute promise to pay at a specified time, is not admissible in order to extend the time for payment, or to provide for the payment out of any particular fund, or in any other way than that specified in the instrument, or to make the payment depend upon condition. Chitty on Cont. (10th ed.) 99 ; *Abrey v. Cruik*, Law Rep., 5 C. P. 41 ; *Allan v. Furbish*, 4 Gray, 504 ; 2 Pars. on Notes and Bills, 501." The testimony of the appellant that the

execution and delivery of the note and order constituted one transaction brings the case within the foregoing rule.

The appellant maintains that no judgment can be rendered upon the verdict under the laws of this Territory, and that the judgment appealed from does not follow the verdict. The note does not appear in the transcript and we have stated what is contained in the pleadings respecting it. The following verdict was returned: "We, the jury in the above-entitled cause, do find a verdict for the plaintiff, and we assess his damages at \$743 in United States gold coin, or in the sum of \$757.86 in legal tender United States treasury notes, which we find to be the equivalent of said United States gold coin." The judgment was entered for the respondent for the sum of \$757.86, and recited that the jury found a "verdict for the plaintiff and against the defendant in the sum of \$757.86." The judgment should follow the verdict. *Frohner v. Rodgers*, 2 Mon. 179. The complaint prayed "judgment for \$422.64 in United States gold coin, or \$480 in United States treasury notes, being its equivalent."

The decisions of the highest courts of the States are conflicting upon the character of the judgment that should be entered upon the verdict and complaint in this action. Within a brief period after the passage by congress of the laws which are known generally as the legal tender acts, judgments similar to that under consideration were affirmed in a number of cases. Afterward, the supreme court of the United States passed upon the questions which are involved in this inquiry, and we must accept and enforce its construction of the statutes of the United States. In *Bronson v. Rodes*, 7 Wall. 229, Mr. Chief Justice CHASE says: "When, therefore, contracts made payable in coin are sued upon, judgments may be entered for coined dollars and parts of dollars; and when contracts have been made payable in dollars generally, without specifying in what description of currency payment is to be made, judgments may be entered generally, without such specification." In *Butler v. Horwitz*, 7 Wall. 258, a judgment had been entered in the court below in favor of Horwitz for the value in currency of the amount of the rent that Butler had agreed in writing to pay in gold and silver. Mr. Chief

Justice CHASE said in the opinion: "When, therefore, it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly." The court held that the damages should have been assessed at the sum which was due in gold and silver coin and judgment should have been entered in coin for that amount, and therefore the judgment of the court below was reversed. In *Dewing v. Sears*, 11 Wall. 379, the facts were the same as in the case of *Butler v. Horwitz*, *supra*, and the court held that the judgment "should have been entered for coined dollars and parts of dollars, instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold." In *Thompson v. Butler*, 95 U. S. 694, Mr. Chief Justice WAITE says: "One owing a debt may pay it in gold coin or legal tender notes of the United States, as he chooses, unless there is something to the contrary in the obligation out of which the debt arises."

These cases establish the rule that, when a contract is payable in gold coin, the intent of the parties must be carried into effect, and the judgment should be rendered for gold coin specifically.

This principle has been recognized and adopted in the following cases: *Independent I. Co. v. Thomas*, 104 Mass. 192; *Warren v. Franklin I. Co.*, *id.* 518; *Stark v. Coffin*, 105 *id.* 328; *Davis v. Mason*, 3 Oreg. 154; *Kellogg v. Sweeney*, 46 N. Y. 291; *Phillips v. Dugan*, 21 Ohio St. 466.

It is apparent that the judgment does not follow the verdict, and that it fails to assess the damages according to the true intent of the parties to the note. No judgment has been entered for coined dollars and parts of dollars. In *Wells v. Van Sickle*, 6 Nev. 45, the action was brought on a promissory note, which was payable, like that in controversy, "in gold coin, or its equivalent in United States legal tender notes." The court below rendered judgment for gold coin. In the opinion of the court, Mr. Justice WHITMAN says: "In conclusion, then, this contract is not illegal. It is in the alternative. If default be made in the payment of gold coin, then as compensation therefor the market value of such gold coin, at the time and place of trial, is to be assessed upon

proper proof made, in legal tender paper dollars; and judgment should be entered accordingly, as suggested in the case last cited. *Lane v. Gluckauf*, 28 Cal. 288. The judgment of the district court being simply and solely for gold coin is erroneous." The judgment in this action must follow the verdict and fix the amount to be paid, if paid in gold coin, and the amount to be paid, if paid in legal tender notes.

The judgment of the court below is modified, and the case is remanded with directions to enter a judgment upon the verdict for the respondent in conformity to this opinion.

The appellant did not make an application in the court below for a modification of the judgment in this respect and no costs will be allowed to him on this appeal. *Noonan v. Hood*, 49 Cal. 293. It is therefore ordered that the cases be remanded without costs to the appellant.

*Judgment modified.*

CASES  
ARGUED AND DETERMINED  
IN THE  
SUPREME COURT

AT THE  
JANUARY TERM, 1879.

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Present:

Hon. DECIUS S. WADE, CHIEF JUSTICE,  
Hon. HIRAM KNOWLES, } JUSTICES.  
Hon. HENRY N. BLAKE, }

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MEYENDORF ET AL., respondents, v. FROHNER ET AL., appellants.

**ESTOPPEL BY RECORD.** To be able to plead a judgment in estoppel it must appear that precisely the same point was in issue at a former trial. A party is estopped only by a title that he put in issue in a litigation, or that he might have so put in issue.

**OUTSTANDING TITLE — location — purchase.** A party ousted of possession under one title is not estopped from purchasing another outstanding title subsequent to the first action, and asserting his right thereunder. Acquiring mining ground by location is procuring such right by purchase.

**RELOCATION OF MINING GROUND — fraud.** A party in possession of mining ground under a title subsequently determined in court as invalid may without fraud, relocate such ground and thereafter perfect such title in accordance with the United States laws.

SUBSEQUENTLY-ACQUIRED TITLE—to whom it inures. A subsequently-acquired title only inures to the benefit of a purchaser from the party who so acquires the same, and not of one who has acquired possession and title by judgment.

ESTOPPEL *in pais*. To constitute estoppel *in pais* the answer should allege that the false representations were made with intent that the opposite party should act upon the same.

FRAUD IN PROCURING A PATENT—who may attack. Where fraud has been practiced in procuring a patent from the United States, only the United States can attack such patent.

CROSS COMPLAINT. A cross complaint should be set up separate from those portions of an answer intended for defenses. It should be complete in itself.

EQUITY—*trustee and cestui que trust*. A party must first show himself entitled to a patent from the United States upon his equitable title before he can have another who has secured a patent title by alleged fraudulent means, adjudged a trustee of such title for his use.

DEFENSE—*new matter—general denial*. Under a general denial a defendant may give in evidence title in himself, and such allegations in the answer do not constitute new matter or present a new issue. A demurrer to such an answer admits only so much as goes to make a proper defense, all else may be rejected as surplusage.

### *Appeal from First District, Jefferson County.*

THIS cause was tried in the court below by BLAKE, J. The appeal was taken from the judgment of the court sustaining the demurrer to defendants' answer.

E. W. & J. K. TOOLE for appellants.

The pleadings and record in this case disclose the following facts: That on the 9th day of June, A. D. 1872, two of the above-named defendants, John Barta and Jacob A. Frohner, located two pieces of mineral land which they designated as the Cannon and Cannon Extension Lode claims. That such locations complied substantially with the requirements of the statutes applicable thereto, and that said claims were held by the locators in pursuance of such statute and the local rules and regulations of the district in which the same were situated; that in August, A. D. 1873, one John Rodgers *et al.* entered upon the said property and located the same under the name of the Star of the West lode. On the 5th day of September following, the said Frohner and Barta instituted their action of ejectment against said Rodgers *et al.* and that the controversy finally terminated in a judgment in favor of the said Cannon and Cannon extension claims and

against the said Star of the West. That whilst said action was pending and said plaintiffs were kept out of possession wrongfully by defendants, one Arthur B. Agno, under an arrangement and in collusion with the defendants, entered into possession of said property and undertook to carry on the defense of said action for an interest in the said Star of the West claim.

That whilst said Agno was so in possession he conspired with said defendants to, and did change the name of said Star of the West claim for the purpose of avoiding any judgment that might be recovered in said action. That in pursuance of this arrangement the name of said claim was changed to the Nelly Grant, and the location and record thereof made in the name of said Agno. That said Agno defended said action and held possession of said property until judgment was rendered therein on the 30th day of August, 1875, in favor of plaintiffs. That on the 2d day of September following, said Agno and said defendants were removed from possession and the same was on that day restored to plaintiffs, upon a writ of restitution issued upon the judgment. And this was the first possession obtained by plaintiffs since their eviction from the property. That on the 29th day of November following the service of said writ, said Agno, during the temporary absence of plaintiffs, went upon the property and posted notices of his application for a patent on the same and that said property was so situated in the mountains as to be utterly inaccessible during the months selected by him for the publication of said notice. That by said notices said Nelly Grant did not purport to be a relocation of the Cannon and Cannon Extension lode, and neither did it appear to be a relocation of the Star of the West lode, and that the plats filed in the proper surveyor's office in Helena City for the District of the Territory of Montana showed that the said claims were not identical. It also appears that all of this was done to elude and deceive the claimants of the Cannon and Cannon Extension lode, and to take advantage of their inability to procure a survey showing the conflict in said claims, in order to interpose an adverse claim to his application which he seemed to consider necessary. That he several times mentioned his application for a patent to the Nelly Grant, but

at all times told plaintiffs that it did not conflict with their Cannon and Cannon Extension claims. That when plaintiffs were enabled to return to said property, and after the publication of notice of said Agno application had expired and the time for interposing their adverse claim in the land office had passed, they discovered, for the first time, that said application did embrace said Cannon and Cannon Extension lodes. The plaintiffs at once filed their *caveat* and judgment-roll, showing the privity of said Agno to said judgment, which, with the other papers, were transmitted to the commissioner of the general land office. That for some cause the said judgment-roll and *caveat* were ignored by that department and a patent issued to said Agno in pursuance of his application on the 30th day of March, A. D. 1876, being within four months after such application was made. That in the mean time and whilst said claimants of the Cannon and Cannon Extension lode were in possession of the same, under their judgment and process issued in pursuance thereof and whilst they were in open, notorious occupancy of the same, said Agno sold and transferred his inchoate interest in said "Nelly Grant" lode to plaintiffs and respondents in this action. That after the said Agno had obtained said patent, said respondents, by virtue of their title theretofore acquired, instituted this action. The appellants by their answer, in addition to the general denial of all title or right of possession in respondents, set up the foregoing facts, together with other equitable defenses, and affirmative matter which will sufficiently appear by the argument and points hereinafter presented. The court below held that the affirmative matters and defenses set up in the answer were insufficient to constitute a defense if proven. Respondents introduced their deed and patent, judgment was rendered in their favor, a bill of exceptions duly signed and appellants appeal to this court.

Eight propositions were especially relied upon by appellants in their original brief, filed in this court, viz. :

First. That by reason of the equitable, as distinguished from the legal jurisdiction, separately conferred upon the several courts of this Territory by its Organic Act, the limitations thereby im-

posed upon the legislative assembly precluded it from converting equitable titles into legal ones so as to authorize the enforcement of rights thereunder in a court of law, and that the inchoate rights conveyed by Agno to respondents before the issuance of the patent to him will not support ejectment.

Second. That the property in controversy was appropriated lands and not subject to relocation under the mineral land laws of the United States. That Agno's pretended relocation and entry was void, and that there was nothing upon which to base a patent or to which it could relate, so as to confer a right of possession upon the patentee, as against appellants in possession, and who were entitled to said property at the time of such pretended location by reason of which *in an action of ejectment* by the patentee they may question the *validity* of the patent or the right of possession under it.

Third. That said patent is void on account of the fraud in making the proofs in the land office to obtain it, and that this fact will defeat an action based upon such patent.

Fourth. That the fraud perpetrated by the patentee upon the appellants enables them to invoke their *equitable defense in connection with their possession*, so as to defeat a recovery in this action.

Fifth. That said Agno is estopped by the judgment rendered in favor of the claimants of the Cannon and Cannon Extension lodes, by reason of his privity, and that his grantees are likewise estopped.

Sixth. That by reason of the actions and declarations of said Agno, by which appellants were prejudiced, he is estopped from asserting any claim to said Cannon and Cannon Extension property on account of his pretended Nelly Grant title.

Seventh. That said respondents, grantees of said Agno, took said property subject to all the rights and equities of appellants and that they can assert the same not only by way of defense, but compel a conveyance of said property in accordance with their prayer for affirmative relief.

Eighth. That appellants, on account of the facts pleaded, were not required to interpose an adverse claim in the land office.

That if they were, sufficient excuse is shown for not doing so. That they do not waive any *equitable right* by a failure to interpose said claim, and that they are not prevented thereby from resorting to a court of equity to protect the same.

In answer to this original brief, respondents have interposed a very elaborate argument to which appellants are called upon to reply.

The utter want of established precedents by judicial decisions, directly in point under the statutes of the United States so recently passed in reference to its mineral lands, and the consequent necessity of resorting solely to deduction from analogy of reported cases to the one at bar, together with the number and importance of the propositions involved in this controversy, have rendered this reply much more prolix than would otherwise have been appropriate or necessary. If, however, we have been able to contribute any thing in inaugurating the correct theory upon which the rights of parties, under this comparatively novel proceeding, are to be determined, we shall feel amply compensated for whatever of labor we have bestowed upon it.

Under the *first* proposition before stated, it is conceded by the respondents that the title conveyed by Agno prior to the issuance of the patent was an equitable one, but they insist that as the patent has since issued the legal title thus acquired by the patentee inures to the benefit of his grantees. And they cite the case of *Shepley et al. v. Cowan et al.*, 1 Otto (91 U. S.), 330 *et seq.*, in support of the doctrine that the patent dates back by relation to the first acts, that is entry and location, which were indispensable to its procurement, and that it shuts off all *intervening* claims and vests the strict legal title in the patentee. As appellants claim by priority of right, entry and location, they are in no wise affected by the propositions thus announced. The other authorities cited by respondents under this head support similar propositions. But how does this in any way relieve the respondent? Their rights, if any they have, were *intervening* rights, acquired after the entry and location of Agno and before he procured his patent. The legal principle enun-

ciated is that the strict title vested in Agno, the patentee, and dated back for its inception, so far as he was concerned, to his location; but that so far as intervening claims or rights are concerned, they were entirely cut off; that is to say, that this transfer of an inchoate right in Agno clothed his grantees with such an equitable estate; that a court of chancery would treat the patentee as a trustee and compel a conveyance, or otherwise invest the *cestui que trust* with his legal title. It is true that while the *legal title* remained in the government, the grantees of the patentee might have maintained ejectment *before* the *issuance* of the patent; but after the Commonwealth parts with this *legal title* and vests it in an individual, the statutes of the United States upon this subject are no longer applicable, and the doctrine announced in *Shepley et al. v. Cowan et al.* at once obtains. This inchoate title under the law and decisions is merged in the patentee and not the *intervening* claimant. That while this title is thus imperfect a third party is not permitted to show the legal title in the government is the reason why ejectment may be maintained between individuals before the strict legal title vests in the patentee. That the title, if any, acquired by respondents by virtue of the conveyance between the date of the location by Agno and the issuance of the patent to him is purely equitable there can be no longer a question. There is, however, another proposition, coming, as it does, under apparent sanction of legislative authority, of more serious import than any of the points before considered. No note is made of it by counsel in their argument, but as it is necessarily involved in the solution of this proposition, we propose briefly to consider it. By section 32, Codified Statutes of Montana, page 401: "If any person convey any real estate by conveyance or instrument purporting to convey the same in fee simple absolute, and shall not at the *time of such conveyance* have the *legal estate* in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance." The legislative assembly recognizing the fact that the grantee in such case only acquired

an equitable estate in the property, evidently designed by this law to raise such title to the dignity of a legal one, so as to enable the grantee to maintain ejectment without the necessity of resorting to a court of chancery to secure by its decree the legal title. Can this be done, especially in cases of title emanating, as does the one at bar, directly from the government by its patent? But for this statute he would be compelled to resort to the court of equity to perfect his legal title before he could recover at law. Thus the act of the legislature ousts the equitable jurisdiction of the court. Can it be done? We say not. First, because the legal claim of respondents was adverse, that is *it set in since* the claim of Agno, and was therefore waived by the proceedings and issuance of the patent, under sections 2325 and 2326 of the Revised Statutes of the United States. Second, for the reason that the government has the right to declare the character and dignity of titles conveyed by patent and has declared the same to carry to the patentee the strict legal title, as will be seen by reference to the case of *Bagnell v. Broderick*, 13 Pet. (U. S.) top page 240 *et seq.* And thirdly, because under the Organic Act of this Territory, the legislative assembly cannot deprive the court of its equitable jurisdiction or transfer such jurisdiction to a court of law.

It cannot convert equitable into legal rights or legal rights into equitable. This would involve the power to utterly annihilate either one or the other of these jurisdictions at the will of the Territorial legislature, and thereby defeat the operation of the Organic Act, the Constitution of the Territory. It can regulate or even blend the practice, but it cannot abrogate the distinction or destroy the jurisdiction of the courts over law and equity cases. In support of this position, we cite section 9, Organic Act of Montana Territory; Laws of the United States for 1875, pages 33, 34; *Bagnell v. Broderick*, 13 Pet. 240, and dissenting opinion of McLEAN, J., 244-246; *Fenn v. Holme*, 21 How. 482; *Hooper v. Scheimer*, 23 id. 248-9; 2 Black. And see, also, 7 How. 846-7; 9 Pet. 632; and especially *Gilmer v. Poindexter*, 10 How. 257; *Swayze v. Burke*, 12 Pet. 11; *Hooper v. Scheimer*, 23 How. 235; *Sheirburn v. Cordova*, 24 id. 423. Our courts,

so far as the question of jurisdiction is concerned, are on the same footing as the Federal courts.

If the legislative assembly can do this in one instance it can do it in all, and by one general act declare all equitable titles to be legal ones, thereby effectually and entirely abolishing the equity jurisdiction of the courts. It is the province and duty of the courts to uphold the laws of congress, and see that the respective jurisdictions are not encroached upon by local legislative enactments. The decrees of courts of chancery upon equitable titles must and should emanate from and speak the conscience of the chancellor, even though the case is tried to a jury.

Having thus briefly considered the first proposition, we pass to the second. The facts set up in the answer show that the claim of the appellants to the Cannon lode set in prior to the pretended relocation of the Star of the West or Nelly Grant; that this piece of property had ceased to be public lands, was no longer open to relocation, but was appropriated and held by appellants under section 2322 of the Revised Statutes of the United States; that by reason of a substantial compliance with the terms of the act, they had acquired a vested right by a grant from the government; that this right had been judicially determined by a court of competent jurisdiction, and that respondents are bound by the judgment. The only condition upon which the claim became subject to relocation is provided by section 2324 — upon a failure to do the annual amount of work required. That forfeitures are odious in law and do not occur by implication is a proposition too plain to require the citation of authority in support of it. A right once acquired may be lost by adverse possession or voluntary abandonment, but if taken against the will of the owner, the authority for so doing must rest in some unequivocal provision of the statute. If the relocation then by the patentee was voidable, one having the older equitable title can defeat his recovery under the patent. The issuance of the patent makes the entry conclusively valid in law as against an *adverse claimant*, that is, one whose claim set in subsequent to the entry of the patentee. See *Shepley v. Cowan*, *supra*; 1 Otto, 330 *et seq.*; *Hoofnagle v. Anderson*, 7 Wheat. 212, 248.

A party may have the simple naked evidences of title without any of the rights that are incident to it. The legal title may be in one and the right of possession in another. The possessor may have such an equitable title against the patentee as will defeat his recovery (see *Boardman v. Lessees of Reed et al.*, 6 Pet. 342, top p. 137), and all of the necessary preliminary steps will be investigated by a court of chancery, under a claim asserted by priority of right. We insist that Agno's entry and relocation was void and unauthorized; that by reason thereof his patent did not carry with it the right of possession, especially against the prior title asserted by appellants. It is clearly demonstrated by the authorities heretofore cited that by relation the patent dates back to the first steps essential to its procurement, and that the *right to possession* under it as against one in a position to question such right must depend upon the validity of those preliminary steps. The original act must be valid. The relocation must have been authorized. Relation cannot be had to a void act. *Doe v. Howland*, 8 Cow. 277; *Jackson v. Stevens*, 16 Johns. 110; *Williamson v. Field*, 2 Sandf. Ch. 533, 563. No authority can be found to the effect that a patent makes an unauthorized entry valid; upon the contrary, if the lands were not "open to relocation," the patent would be inoperative. See *Belk v. Meagher et al.*, decided at the present term of this court.

If the relocation of Agno was voidable, it shut out only *intervening* or *adverse claimants*. Those alone are concluded by the patent. See *Shepley v. Cowan*, 1 Otto, *supra*. Appellants assert rights under the doctrine — *prior est tempore potior est jure*.

The third proposition arises out of the allegations in the answer; that the proof made by said Agno, in order to procure a patent, was false and fraudulent; that he made his false affidavit; that he had been in possession a sufficient length of time to acquire a title by the Statute of Limitation; that he made false and fraudulent affidavits as to the value of work done, and procured by fraud the certificate of the clerk of the district court to the effect that there was not and had not been any litigation pending in reference to said property; that he was enabled to procure said certificate by fraudulently changing the name of

said property, in order to avoid the judgment in favor of appellants and against Rodgers *et al.*, under and in collusion with whom he entered into possession of said property pending the litigation. We shall content ourselves upon this point by referring to the case of *Johnson v. Townsley*, 13 Wall. 72 *et seq.*, where the supreme court of the United States lays down the doctrine that when the officers of the land office have been imposed upon by fraud, false swearing and mistake, the judiciary will not interfere so long as the matter remains in their hands for action, but that after the title has passed from the government to individuals and the question has become one of private right, the equitable jurisdiction of the courts may be invoked for the purpose of determining whether or not the patentee does hold in trust for another.

The facts set up in the answer comprising the fourth proposition heretofore presented disclose a case peculiarly cognizable in a court of chancery. The relief sought is purely of an equitable character, and cannot be obtained in any other tribunal. The averments are, that whilst the suit was pending between the Cannon and Cannon Extension lodes and the Star of the West, said Agno entered into possession under the Star of the West title, and undertook to defend for an interest in it; that for the purposes of avoiding the judgment, he conspired with his co-tenants in the Star of the West, and changed the name of the same to the Nelly Grant; that by means of the litigation carried on by him he managed to keep the owners of the Cannon and Cannon Extension out of possession; that they were reinstated in that possession on the 2d of September, 1875, and that during a temporary absence from the property, Agno, on the 29th of November, proceeded to the premises and posted his notices of his application for a patent for the same; that within five days after such notices were posted it became utterly impracticable for the claimants of the Cannon and Cannon Extension to return on account of the great depth of the snow; that the plats he returned to the office of the surveyor showed the property thus applied for to be in a different locality, and that the same was

not identical with the Cannon and Cannon extension lodes; that he fraudulently represented to appellants that the property so embraced in his application did not conflict with their claim, and that appellants from these facts were compelled to and did rely upon such representations. We hold the established doctrine in such case to be, that where the superior rights are with persons other than the patentee, courts of equity will treat him as a trustee, to get at him. It can make no difference whether such trust is created by the express intention of the parties, or by fraud independent of such intention. See 3 Washburn on Real Property, 174-179, and note; 1 Story's Eq. Jur. (9th ed.), §§ 1195, 258, 259, 295. See, also, authorities cited under 12th subdivision of appellants' original brief filed in this cause. And we insist that under our system of practice legal and equitable actions may be united and blended in one, and that equitable defenses to an action of ejectment, or other legal cause of action, may properly be interposed, subject alone to the well-established rules governing the respective jurisdictions which we have before considered. The principle announced in the case of *Johnson v. Towsley*, 13 Wall. 84, 85, shows that the doctrine that the legal title must prevail in ejectment only obtains in those courts where such equitable defenses cannot be interposed. The case of *Hornbuckle v. Toombs*, 18 Wall. 648, is to the effect that under our Organic Act, the legislative assembly of the Territory may regulate the *practice* in equity cases; and under the following authorities it will be seen that under sections 1, 56, 59 and 60 of our Civil Practice Act, the right to maintain an equitable defense to an action of ejectment is amply provided for. See *Cary v. Goodman*, 12 N. Y. 266; *Hoppough v. Stubble*, 60 id. 434; *McAlpen v. Henshaw*, 6 Kans. 176, 191; *Ayres v. Bensley*, 32 Cal. 620; *Rose v. Treadway*, 4 Nev. 459, 460. And such was the opinion of this court in the case of *Reece v. Roush et al.*, 2 Blake, 586, where the rule is laid down that affirmative relief need not be asked or granted, but may be asserted purely by way of equitable defense to the action. In the case of *Estrada v. Murphy*, 19 Cal. 249, 272, 273, Mr. Justice FIELD says, in substance, that when under such statutes this equitable defense may be interposed it in no

wise conflicts with the established precedents that in ejectment the strict legal title must prevail in courts of law. It will be seen, also, by reference to *Stark v. Starrs*, 6 Wall. 402, 409, appellants set up facts entitling them to affirmative relief under chap. III, p. 94, Cod. Sts. of Montana.

Upon the 5th proposition, that Agno, the patentee, is estopped by reason of the judgment recovered for the same property by the Cannon and Cannon Extension lodes against the Star of the West, we submit the following points and authorities:

1st. He purchased an interest in the Star of the West and went into possession pending the suit. See *Freem. on Judg.* 267, 299; *Cod. Sts.* 29, § 16; *id.* 95, § 312; *Merle v. Matthews*, 26 Cal. 475; 1 *Story's Eq. Jur.* (10th ed.) 405, 406, 407; *Marshall v. Shafter*, 32 Cal. 195; *People v. Wilson*, 26 *id.* 125, 126, 127; *Herm. on Estop.* 55, §§ 61, 63; *Walden v. Bodley*, 9 How. (U. S.) top p. 28, 29.

2d. He agreed to defend that suit and was amenable to the writ of restitution issued in it. *Herm. on Estop.* 46; *Freem. on Judg.* 146, 147; *Peterson v. Lathrop*, 34 Penn. 223.

3d. If Agno was bound by this judgment he was under the same obligation to redeliver possession before he could build up a title, on account of the possession thus acquired, as those against whom it was rendered. *Satterlee v. Bliss*, 36 Cal. 516; *Byers v. Neil*, 43 *id.* 210.

4th. His title, if he ever had any, was extinguished in the judgment before it reached the conveyance to respondents. *Campbell v. Hall*, 16 N. Y. 581; 1 Iowa, 23; 6 *id.* 188; 8 *id.* 326; 24 How. 362; *Bludworth v. Lake*, 33 Cal. 262, 263.

5th. And this judgment concluded the rights of all the parties bound by it as they existed at the very date of its rendition. *Freem. on Judg.* 211; *Marshall v. Shafter*, 32 Cal. 195; *Sherman v. Dilley*, 3 Nev. 21-27; *People v. Strasburg*, 2 Bibb, 523. Many of these authorities show that the respondents, grantees of Agno, are likewise bound whether they purchased before or after the judgment. Besides charging respondents with actual notice, the answer avers that at the time they purchased appellants were in the actual, open and notorious possession of the

property. That this charges them with all the equitable rights of appellants, and leaves them in no better situation with respect to them than Agno, their grantee. See authorities cited in appellants' original brief under eighth subdivision.

The position taken by respondents, that the judgment thus pleaded operates neither as a bar nor estoppel in this action, proceeds upon the assumption that the title acquired by Agno and conveyed to respondents was subsequent to the institution of the action, in which such judgment was rendered. It is conceded that this Nelly Grant claim is the newly-acquired title sought to be established. We contend that the facts set up in the answer negative the idea and preclude the possibility of the acquisition of any such title by him. For illustration: Suppose the respondents had set up this pretended new title in manner and form as averred in the answer — which for the purpose of this case must be taken to be true — how, then, would the case stand? They come into this court and allege that Agno purchased in the Star of the West, went into possession under and in collusion with the claimants of said lode, during the pendency of an action against them by appellants; by means of the defense of said action kept them out of possession, changed the name of the property to the Nelly Grant to avoid the judgment, all of which was done before the property was returned to appellants, and before the writ of restitution issued upon this judgment was served upon him. What new right has he acquired? Can he make this tortious possession the basis of establishing a new title? This class of titles are the sole offspring of possession. It is not like the acquisition of a title from a source independent of possession. If this principle is to prevail we have the astounding problem established by judicial decision, that by the maintenance of litigation by one in the wrongful possession of the property of another he can make that possession the source of acquiring a superior title. That an adversary claiming from a common source can intrude himself into the possession of property and defeat the rights of the true owner, for the sole reason that such owner invokes the aid of the courts for his protection. The law would cease to be a pliant instrument in the hands of

justice, and the court transformed into a tribunal that frowns upon right and smiles upon wrong. As well might respondents, without title or equity, avail themselves of a legal remedy for the maintenance of a wrongful possession of the property of appellants, and invoke the benefit of the Statute of Limitation during the pendency of the action. There is no difference in the two cases. They would both have their origin in and result from possession "*pendente lite*." The true theory upon which the solution of this case depends is settled by the authorities cited by both appellants and respondents. The patent is but the evidence of a grant or title acquired by location. It gives no new title, and this is the very title that was tried. It was merged or extinguished by the judgment in which Agno, the patentee, and his grantees are bound as privies. If Agno, the patentee, had surrendered his possession to appellants as he was under a legal obligation to do, or the service of the writ of restitution had dispossessed him, he would then have been in a situation to have afterward made a new location, and thereby relieved himself from the binding force of the judgment. The authorities cited by respondent all bear out this view of the case. In discussing the question as to what is a newly-acquired title in similar cases to the one at bar, the court, in *Judson v. Malloy*, 40 Cal. 299, cited by respondents, say: "We do not understand that Montgomery *obtained the title* or was *enabled to pre-empt* by reason of any settlement prior to the sheriff's sale. If at that time he had an inchoate right which afterward ripened into a title, there would be some plausibility in the position of defendant. But as we understand the findings of fact, Montgomery was allowed to pre-empt by reason of a settlement made *after* he had been ousted from the land under Whiting's judgment. The judgment was not a bar to any title acquired by Montgomery *after its rendition*."

This authority bears out the proposition that notwithstanding a patent may issue after the rendition of a judgment by which the patentee is bound on account of a location made before the judgment, the judgment will prevail. His patent is but the evidence of the title tried, and dates back for its inception to the

first necessary act done to procure it ; that the location was this act and that he was therefore bound as to all title he had at the date the judgment was rendered ; that, like the case at bar, he should have surrendered the possession and location made before the judgment, and entered and located under a new claim to acquire a new right ; that without doing so he was in no situation to assert his patent title against the judgment. And this, we believe upon principle and authority, is the correct doctrine upon this subject. See *Judson v. Malloy*, 40 Cal. 299 ; *Byers v. Neal*, 43 id. 211 ; *Bludworth v. Lake*, 33 id. 262, 263 ; 1 Iowa, 23 ; 3 Wash. on Real Prop. 178 *et seq.*

If, then, Agno was bound as a privy to this judgment, and he acquired no new title by his patent, the title he had expended itself in or was at least extinguished by the judgment, and he was and is amenable to its process. Respondents, however, notwithstanding these authorities, still insist that the judgment was only conclusive against the Star of the West. Upon the same reasoning we can as safely contend that it was an adjudication in favor of the Cannon and Cannon Extension lodes, and established its title to the *very piece* of property in controversy at the date the adjudication was made. These judgments are based upon proceedings so much in their nature in *rem* that they should be held conclusive as to all persons whose rights set in before its location. More especially should this be so, as against one who acquired possession, as did Agno, and in collusion with the claimants of the Star of the West changed its name to avoid the judgment. See *Murry v. Fredericks*, 9 Dana, 202, 203 ; *Lytle v. Arkansas*. 22 How. 193.

The authorities cited by respondents, supporting the general doctrine, that when the law establishes a particular tribunal, and provides a remedy, it should be pursued, would be good law and applicable if appellants were seeking to control the action of the officers of the land office. These officers are vested with certain powers and charged with certain duties in their department, by which the government is divested of the legal title to certain portions of the public domain subject to entry. As this subject will be hereafter more fully considered under a different head, we dismiss

if for the present. Another position upon which respondents seem to rely with much confidence, "That as it appears from some of the facts set up in the answer, Agno obtained his patent by the perpetration of fraud in his proofs before the officers of the land office," the only remedy afforded is by a proceeding on the part of the government to set it aside, is not supported by any of the cases cited, when applied to the one at bar. These citations, with the exception of *Boardman v. Lessees of Reed & Ford*, 6 Pet. 328, are either cases in reference to patent rights in which the government and people are directly interested in canceling patents obtained by false suggestion and which bear no analogy to the equitable doctrines of trusts applicable to real property, or else they are cases originating in the courts of the United States, where equitable defenses and relief of this character are not afforded in actions of ejectment. In the case cited the court say: "When an individual claims land under a tax sale he must show that the substantial requirements of the law have been observed. But this is never the case when the claim rests upon a patent from the United States. *The preliminary steps may be investigated in chancery when an elder right is asserted; but this cannot be done at law.*" This establishes the principle contended for by appellants, that the patent carries with it the presumption that the patentee is the legal owner of the property conveyed, and that the preliminary steps necessary to its procurement have been complied with, and that these presumptions can only be overcome and these facts inquired into by one having a prior or equitable title in the property. Conceding, however, that the government might interpose on behalf of one having a superior right in the patented lands to set it aside, this does not preclude such person from instituting his suit in a court of equity to declare the patentee a trustee and compel a conveyance, or obtain other appropriate relief. The supreme court of the State of Arkansas, upon the authorities cited by respondents, sustained their position; but the case found its way into the supreme court of the United States and was on that point reversed. See 18 How. 43; 20 id. 8; and especially 22 id. 202 *et seq.*, and 13 Wall. 72. In connection with this proposition respondents also refer to the latter portion

of section 2325, U. S. Rev. Sts., and contend that we are limited to the mode therein pointed out. This is true, so far as any objection to the issuance of the patent is concerned. The provision was evidently intended to afford an opportunity of showing that the *necessary proofs were not made before the land office*, so as to avoid the presumptions arising by reason of the issuance of the patent against one having a prior equitable right to the property. The law provides that upon making a certain showing in *that office* the applicant shall be entitled to a patent; that is, the government passes to him the legal title. It does not even indulge the inference that one having the prior equitable title because of a failure to interpose this objection, is thereby precluded from showing in the proper *court* that the *proofs* and *showing* made were false and fraudulent. Under similar statutes, giving this remedy and providing that the action of these ministerial officers "shall be final," it is confined solely to the question of the issuance of the patent; but when issued, the courts have constantly held that it is subject to the equitable rights existing between the patentee and third parties. The government only assumes to clothe the *patentee* with the strict legal title, but does not thereby sanction any fraudulent practices, or relieve him from any equitable obligation he may be under to his fellow man. Many authorities might be cited showing that this right and remedy is not exclusive. See *Wilson v. Castro*, 31 Cal. 420; *Barnard v. Ashley*, 18 How. 43. If, however, such was the case, it will be seen from the answer that under this section of the statute, appellants did file a copy of the judgment-roll with proof of the privity of Agno to the judgment, showing that the certificate of the clerk was fraudulently obtained by reason of changing the name of the lode, and the case of *Johnson v. Towsley*, *supra*, establishes the doctrine that if the judgment bound Agno and the officers of the land office erred in their *construction* of the law in that behalf, the court will correct it, and award the property to the one lawfully entitled to it.

Respondents also cite authority to the effect that the action of ejectment is a possessory action, and that the legal title may be in one person and the right of possession in another. They also

contend that there was no error in rendering judgment upon the answer for the reason that appellants do not show that they are entitled to a patent, *i. e.*, affirmative relief. How these two positions can be easily reconciled we are unable to see. They seem to overlook the fact that *they* are seeking to recover in this action, upon their *title* and *right of possession*, and that the defendants may in such case invoke an equitable title to defeat a recovery without obtaining affirmative relief. This court so held in the case of *Reece v. Roush*, 2 Blake, 586. It by no means follows that respondents must recover unless appellants are at the *very time* entitled to a patent from the government.

We have shown that this property was not subject to relocation and entry by Agno at the time he entered. It was withdrawn from market so far as he was concerned. He was prohibited from making the entry. If the land was not subject to private entry by any one, there might be something in the position of respondents that appellants were in no situation to obtain a patent. In such case no title would pass by the patent, and the patentee would be in no situation to be treated as a trustee on that account. Under the mineral land law, it is true, the person actually entitled to a patent may never procure one, and yet the lands are subject to entry. In such case it matters not with the government who gets the legal title; its demands are satisfied when the necessary proofs are made and the price paid for the land. After the emanation of the patent, the question with the government who may eventually be entitled to the property ceases to be one of importance. It then becomes one of private rights as between individual claimants. The real question in such case is, had the patent not issued, who had the better right to it?

The answer does show that appellants are in a situation to make all the necessary proofs and obtain a patent but for the patent of respondents. The authorities show that in many instances the courts have treated the patentee as a trustee and compelled a conveyance, when at the time the *cestui que trust* was in no situation to make the necessary proofs to procure a patent in his own name. When the trustee has done all that is requisite and

procured a patent, whether he be a trustee on account of privity of contract, or of an express or constructive trust, it inures to the benefit of the party for whom he should hold. They are constructive trusts dependent upon conclusions of law from a given state of facts or circumstances, independently of any contract, and frequently arise when there is no intention on the part of the parties concerned to create them. It is when the person holding the legal title to property cannot enjoy the beneficial interest, without violating some equitable principle. "In the one case the *acquisition* of the legal estate is tainted with fraud, either actual or equitable; and the other where the trust depends upon some general equitable rule, independent of the existence of fraud." The facts in this case will bring it within either.

The whole question is whether, under the rules applicable to courts of equity, he should hold for the benefit of another. If appellants under such circumstances are to be turned out of possession, they might never be able to make the necessary proofs to procure a patent and their inchoate equitable title coupled with possession be forever defeated by the wrongful acts of the patentee. If appellants have an equitable title to the property, and would have been in a position to have perfected their legal title by patent but for the wrongful acts of respondents, the courts will, as between the parties, treat such requirements of the law as having been fully complied with by the party having such equitable title. In no case will they ignore the doctrine that possession coupled with an equitable title will prevail in an action of ejectment, when the functions of a court of chancery are properly invoked.

We assert as the established precedent by the adjudication made in the supreme court of the United States, that a conveyance of a title acquired by patent may be enforced by one claiming under a deed, sale upon execution, a judgment recovered in a court of competent jurisdiction, or a trust created by the fraud of a patentee, even though such person had never made an entry upon the property, and could himself make no proof that would entitle him to receive a patent in his own right.

Respondents claim that the amendment offered to the answer

purporting to allege an estoppel of any claim of the patentee and his successors in interest to the property in dispute will not be considered in connection with the original answer ; that the allowance of such an amendment was a matter of discretion in the court below, and that its ruling in that respect will not be reviewed unless it appear that there was an abuse of such discretion. An inspection of the bill of exceptions embodied in the record will show that the court did not reject the amendment for the reason that in *its discretion* the necessary showing to entitle it to be filed had not been made and proceeded upon the sole ground that the amendment would not aid the original answer, and that a demurrer would be sustained to the same if so amended. The discretion, to which the rule invoked applies, is in reference to the showing of facts entitling it to be filed. When it involves the judgment of the court solely as to the legal sufficiency of the plea sought to be filed, it presents a similar question for review as if the amendment had been allowed and a demurrer sustained to it. Hence we contend that the allegations set up in the answer and amendments to it, for the purposes of this action, must be taken as true.

Under this pleading, then, as one of the grounds of estoppel *in pais*, the following facts appear: That after appellants had filed the judgment-roll and affidavits in the nature of a protest, and before the issuance of the patent, they proceeded to the ground in dispute to perform the hundred dollars in labor required to represent it annually and no more ; that while there for that purpose, Agno, the applicant for the patent, came upon the premises, tore down his notices, stated that he really had no right in the property, and would thenceforth never assert any claim to it ; that appellants could proceed accordingly ; that they relied upon such statements and acts, and were thereby induced to expend about \$2,500 in work and money upon the property, which they would not otherwise have done ; that they paid no more attention to their protest so interposed as aforesaid, and that Agno, the applicant, well knew that they were in good faith, relying on and acting under his said acts and declaration, and their said inducements were afterward ascertained to be willfully

and fraudulently made. The uniform current of authorities work an estoppel against said Agno and his grantees, who in this case are charged with having notice of appellant's equities, and forbid them, upon the stated facts, from asserting a title flowing from the rights said Agno then had. We respectfully submit that upon this point the plea was good and that appellants were entitled to a trial of the issues tendered by it.

A brief consideration of the remaining propositions, as to whether appellants are precluded from asserting these rights and equities by reason of a failure to interpose an adverse claim in the land office, within the time provided by the act of 1872, or whether from the facts of this case it was a proper one to be so interposed, and if it was, has sufficient excuse been offered for not doing so, will conclude this discussion. It is contended on the one hand that this failure incurs a forfeiture of all rights and equities of appellants, and that they consequently have no standing in the courts; while upon the other hand it is claimed that it only affects the action of the commissioner in the issuance of a patent with the incidents usual in such cases, and that the courts of the county are still open for the assertion of those rights and equities.

It may certainly well be claimed, that if appellants had filed their adverse claim and commenced suit as required by the act, and obtained judgment, the law would demand that the commissioner issue a patent to them upon filing the judgment-roll. So it is with the respondents, if they have complied with the formula required, and appellants have not, the law is equally imperative in imposing upon that office the duty of issuing them a patent. Yet, it is nevertheless true that, after the patent issues, in a court of law or equity, as the case may be, the principles applicable to the verity and effect of judgments will be enforced between the parties without regard to whom the patent has issued. The one department acts with reference to the issuance of the patent, while the judicial tribunals pass upon the rights of the parties concerned, *ex post facto*, the patent. It may be said that the judgment in such case is collateral to the application for a patent, and is of no binding force upon the *commissioners*. It

is nevertheless a judgment, and valid and binding in all tribunals where such judgments are recognized. The very object of the interposition of an adverse claim is to obtain an adjudication upon the rights of the parties as they existed at the time. If this has already been done by the court, to which it would be referred for that purpose, the judgment is conclusive between the parties and privies whenever the question arises in those tribunals, if not, in proceedings before the commissioner to procure a patent, to which it may be deemed collateral.

In those forums where the rights of one entitled to the beneficial estate prevails against the legal title, the legal title will be deferred and the judgment upheld. This rule is subject, of course, to the qualifications that no new right is conferred by the patent, or accrued since the rendition of the judgment. Which propositions, so far as applicable to this case, have heretofore been discussed under two distinct heads. It is then for the court to determine the validity and conclusiveness of judgments, except in the particular instances where the law imposes this duty upon the commissioner. In the case of *Seymour v. Wood et al.*, the officer of the Land Department, in passing upon the effect of the act referred to, and in a case arising under it, lays it down as the true rule, that when a party fails to interpose an *adverse claim* and commence suit within the time required, but has obtained a judgment in a court of competent jurisdiction for the *same property*, such judgment is not a bar to the issuance of a patent. His remedy is in the proper courts to have the patentee declared a trustee and compel him to convey the property for which the judgment was rendered. If then it was not a bar in the Land Office, it *was* in the very court where this action is now pending. What, then, is to be gained by having the court again render this judgment so as to prevent the issuance of the patent when the parties in possession of the property under a writ of restitution, properly enforced against the patentee, could invoke the judgment in defense of their possession or to compel a conveyance in an action instituted by the patentee or his successors in interest, who are alike affected by the judgment. It is not like entries and patents under the homestead law, where such rights

are expressly shut out. This right under the judgment was a legal right until converted into an equitable by the issuance of a patent, after which the beneficial interest was in the one and the legal estate in the other. We insist, then, that the claim of appellants, on account of the judgment, was not *adverse* in the sense of the act, but an adjudicated right as against the parties to, and the persons bound by it.

Again, we contend that aside from the judgment this was not an *adverse claim* as contemplated by the act referred to, in so far as the commencement of the suit required after the publication is concerned, for the reason that appellants' rights set in prior to that of the applicants for a patent. The statute upon this subject seems to have contemplated that the original locators would become applicants pursuing the theory of the courts upon this subject for the reason that their rights are not concluded by the patent. It denominates one of the parties *adverse claimants*, that is, those whose rights set in subsequent to the original claimants, or, in other words, relocators and adverse claimants are convertible terms. The act confers upon the *adverse claimants* the right to bring an action against a prior locator to determine the right of possession, and if he fails to do so, he waives his adverse claim and becomes a third party, from whom no objection will thereafter be heard, except that the applicant has not complied with the law. If there have been two relocators, and the intermediate relocator is the applicant, it devolves upon the second relocator, or adverse claimant as we call him, to bring the suit, and the appellant who is a relocator or *adverse claimant* as to the original locator — if he has not been made a party — must clear his title by suit against the original claimant. And such seems to be the opinion of the attorney-general, as will be seen by reference to Weeks on Mineral Lands, 15, 204 *et seq.* He must furnish his proofs that he was an original locator, or successor in interest of said locator; or that he is a relocator *in possession*, and cleared the cloud upon the title of his predecessor in interest by suit for that purpose, or held and worked the property for a sufficient length of time to acquire a title by the Statute of Limitations. Copp's U. S. Min. Decis. 257.

And there is every reason why this should be so, unless the person making the relocation, in order to make it valid, is required to give in his record and notice a designation by name of the particular lode relocated. In the original location of the property the locator is required to so mark out the boundaries as that the lines may be readily traced. This with his record makes good his title, without visiting the premises for one year.

If a relocator goes upon the property he can at once see the name of the lode and the records will disclose the name of the locator. If he relocates and applies for a patent, he must bring suit on account of his *adverse claim*, unless he can show that he has held such adverse possession for the period prescribed by the Statute of Limitations, as provided by section 2232 of the act. It is not unfrequently, if not the case in nearly every instance, that the nearest claimant to the property located is situated many miles from it, and unless the relocation and notices designate it as a relocation, and name the lode relocated, the rights of the original claimant might become lost before the year had expired for a forfeiture, without even having notice that would reasonably indicate that such proceedings were pending. Such a forced construction of the act by the court to impart notice would become as obnoxious in a civilized country as the method provided by the laws of Caligula. It must be construed with reference to the legal terms used and the objects evidently to be accomplished. It is not like an application to enter a certain legal subdivision of the public lands designated by a particular quarter section, township and range, when the records of the land office will at once disclose the entries and names of the parties making it, and notice will be given him accordingly. Unless in mineral entries these requirements are observed in relocating the property, or such relocater is the one upon which the burthens of bringing an action to determine his right of possession is devolved, this law becomes a formidable weapon in the hands of a trespasser to be successfully used against the just rights of an unguarded and defenseless owner without even affording an opportunity to be heard.

Besides, the theory of the law is to uphold the older title until it is overthrown. The burthen of overcoming it is on the ad-

verse party. It proceeds so far as presumptions go upon the theory, "first in time, first in right." And so strenuously have the courts upheld this doctrine, that in all cases they decide that a patent only cuts off *intervening* or *adverse* rights; that those whose rights set in prior to the emanation of the patent, that is, the first steps necessary to procure it are taken, are preserved from such a fate. We insist that this law was made with reference to the precedents established by these decisions; that they are founded in justice, and that a fair construction of the act does not militate against them. Besides this, the original claimant might be put to interminable litigation if he was fortunate enough to find out, or his title finally lost if he was not so fortunate, by a series of relocations in form original, as in the case at bar. Copp's U. S. Min. Decis. 257.

Besides the two foregoing reasons assigned, why appellants were not required under the act to interpose their claim in the land office and bring suit, viz.: 1st, Because of the estoppel of judgment; 2d, because their claims were not *intervening* or *adverse*, but set in prior to the relocation of respondents; there are other reasons equally cogent from the facts disclosed by the answer. It appears that the plats filed in the land office show that the Nelly Grant is not the same property as the Cannon and Cannon Extension lodes, and does not cover any part of those claims. This forms a part of the notice required by the act, and it is upon the sufficiency of this notice must depend the necessity of interposing an *adverse* claim, should a *prior location* be considered such a claim. The ground during publication was utterly inaccessible. The applicant claimed there was no conflict in the property, and the plats upon which the notice was based showed the locus of the Nelly Grant to be a different claim. How were appellants then to ascertain the facts? If they were affected with constructive notice by reason of the plats, those plats must furnish the necessary information. It is not enough that the party affected by the notice did not examine them. They must be such as to impart the notice had the inspection taken place. It would certainly be a serious perversion of all principle to permit an entry of lands other than those embraced in the field notes

and plats, which comprise a part of the application from which notice of the locus of the property is given, and at the same time declare the rights of other parties claiming the same property to be barred by limitations by reason of a failure to appear and assert that claim. The patent must follow the field notes and plats. The issues on this point show that by the patent the property is identical by the admission made in the record, whilst the fact that the plats do not show them to be identical is also admitted for the purposes of this argument. The patent has no support without the survey and plat as against one whose rights are to be affected by it. This affords, we contend, a good legal defense to the action, and valid excuse for not appearing in the land office, if we were required to do so. Again, the answer avers that the property was inaccessible during the publication of the notice, so as to render it impossible to procure the necessary survey to interpose their claim had they been apprised of the conflict. No action could be maintained to enjoin the officers of the land office, and the statute was one of limitation, without *within itself* providing any disabilities by which those officers were to be controlled. Yet in such cases this court decided at its last term in the *Territory v. Deegan* that a valid excuse might exist to avoid the legitimate consequences resulting from the express terms of the act. See, also, Copp's U. S. Min. Decis. 19; 2 Iowa, 11 *et seq.*; 20 How. 6 *et seq.*; especially 18 How. U. S., 1, 5, 6, 43; 17 id. 560.

If, however, under all the facts, it was necessary for appellants to interpose their claim in the land office and bring another suit, what is the penalty attached for not doing so? To what extent, if any, do they lose their rights? Is it a waiver of all rights, or is it a waiver simply of the right to oppose a patentee? Has the act, by reason of the remedy afforded by adjourning the controversy to the courts, thereby concluded all the legal and equitable rights of the parties failing to avail themselves of such remedy? We contend that the decisions of the courts as well as the officers of the land department under similar statutes have universally held that this remedy is not exclusive except for the purposes of preventing the issuance of the patent. Under section 10, p. 326,

U. S. Sts. at Large, vol. 11, it is provided that the decision of the commissioner in *contested* cases, unless appealed from to the secretary of the interior, *shall be final*, using much stronger terms than the act in question, and no one doubts the power of congress to constitute them judicial tribunals for this purpose. Yet, in *Johnson v. Towsley*, 13 Wall. 72, a case arising under this statute, the court limit its operations to the applications for patents in the land office, and hold that it does not obtain in courts where the rights of parties to certain real property are determined according to the recognized rules of law and equity applicable to such courts and cases.

So we claim that sections 2325 and 2326 of the mineral land act is in reference to the steps necessary to be taken to procure a patent. In favor of the converse of this proposition and the doctrine contended for by respondents, will be found the dissenting opinion of CLIFFORD, J., in the case last referred to. Hence, in this case all that can be said is, that appellants might have prevented the issuance of the patent, and by not doing so they were placed in a situation requiring them to resort to a court of chancery to establish or defend their rights. Mr. Yale, who seems to have made these questions a specialty, in his valuable work on *Mining Claims and Water Rights*, p. 374 *et seq.*, asserts the principle that under the act in question, the real owner does not forfeit his right to apply to the courts for relief, by reason of a failure to interpose his claim and institute his action; and he cites many authorities under analogous statutes in support of his position.

Under the laws of California, statutes 1859, p. 338, containing almost similar provisions for adjourning these contested cases in the land office to the courts for trial, the supreme court of that State held, in *Bludworth v. Lake*, 33 Cal. 258 *et seq.*, that the remedy thus provided was not exclusive. By the terms of this statute, a notice was given to all adverse claimants to appear and contest the claims of the applicant, and upon a failure to appear the patent was granted. When an adverse claim was put in the papers were transmitted to the district court for a judicial determination of the rights of the respective parties. The case last referred to clearly presents the question. No fraud was charged,

and no excuse for a failure to interpose an adverse claim was offered. Yet the court holds that notwithstanding this remedy is afforded to defeat the application and prevent the issuance of the patent, the adverse claimant need not avail himself of it, but may come into the courts on his own motion, after the issuance of the patent, and upon a proper showing convert the patentee into a trustee for his benefit. It is subjected solely to the disadvantages arising from a patent by which his adversary is clothed with the legal title and is compelled to resort to a court of equity to divest him of it. The provision that upon a failure to interpose an adverse claim within the time prescribed by the Mineral Act it shall be deemed waived is not more comprehensive in its scope than the terms of the California statute "requiring the patent in such case to issue to the applicant." The patent imports absolute verity in a court of law, and in that court implies a right of entry in the patentee, provided the land at the time was subject to location. See *Megerle v. Ashe*, 33 Cal. 74 *et seq.*

Whilst many of the questions presented are old and familiar in their application, others growing out of the construction to be given this mineral act, so far as they are involved in this controversy, are novel and afford a wide field for differences of opinion. It is not, therefore, claimed that we are entirely free from doubt in some of the deductions we have made; but by parity of reasoning from such authorities as we have been able to find bearing upon the subject, believe they are in the main correct. We think, however, it can safely be said that when the government parts with its title, and the question has become one of private rights between individuals, that the courts in all such cases determine those rights in accordance with the well-established principles of equity. That whenever the transactions of a party are so tainted with unfairness as to render it unconscionable to permit him to retain the benefits of an advantage he has thus acquired, he will be treated as a trustee to get at him, and compelled by the court to yield up the last vestige of his ill-gotten gains.

The unparalleled rapidity with which the patent was carried through the land office at Washington, *out of its regular order*,

was in direct violation of the regulations of that department. These regulations have the sanction of law, and should be considered in connection with the rights of appellants in this case. The very object of the provisions of the statute, allowing "objections from third parties," was to afford an opportunity of showing that the "appellant had not complied with the act." It was contemplated that such parties should have the full period of time from the completion of the publication of notice to the issuance of the patent in its regular order in which to interpose these objections and make the necessary proofs. The application of Agno is in no respect made an exception under the law, and the merits of the controversy should not now be ignored by the courts on account of favoritism by, or imposition upon, the officers of the department. It is not an exceptional case, and is not, therefore, entitled to the benefit of an exception. But for this the proofs in support of the allegations of the answer would long since have been pending before that department, and in all probability the application denied and the patent refused. And it is this patent that has clothed a tissue of falsehoods with the habiliments of verity in a court of law, which are now sought to be dismantled in a court of chancery. We submit that the facts in this case are not only wanting in all those qualities of fair dealing that ordinarily characterize transactions between man and man, but that every act since the inauguration of the Star of the West and Nelly Grant claims are but links in a chain of testimony leading unequivocally to but one conclusion — that the claim of respondents had its inception in a deep laid scheme of fraud, and that the patent sought to be made available in this action, is the offspring of a series of concerted plans, born in corruption and the product of skillful practitioners in that line of business.

CHUMASERO & CHADWICK, and SANDERS & CULLEN, for respondents.

1. As to the first point made in appellants' brief, viz.: That the title of plaintiffs is but an equitable one, and will not, therefore, support an action of ejectment, respondents contend it is not well taken. The complaint was filed on the 12th day of May, 1876,

and alleges that plaintiffs were seized in fee of the demanded premises on the 3d day of March, A. D. 1876, which was the date of the issuance of the patent. The date of the application for patent nowhere appears in the transcript, but it must have been prior to the making of the deed to plaintiffs by Agno, and prior to the entry of defendants into possession of the premises on the 2d of September, 1875, for, as is averred in the eighth subdivision of defendant's answer, Agno immediately after their entry tore down the notices, plat, etc., posted upon the claim. While we do not concede the position of appellants to be correct in any particular, we say that if it were true that Agno only conveyed by his deed an equitable title, this would not avail the appellant as a defense in this case for the reason that a patent has since issued for the premises, and it is a well-established doctrine that the patent when issued will relate back to the date of the application for the same. *Shepley v. Cowan*, 1 Otto, 330; *Leese v. Clark*, 18 Cal. 570, 571; *Moore v. Wilkinson*, 13 id. 478; *Yount v. Howell*, 14 id. 465; *Stark v. Barrett*, 15 id. 362; *Ely v. Frisbie*, 17 id. 250; *Klein v. Augenbriht*, 26 Iowa, 493; *Stark v. Starrs*, 6 Wall. 402.

2. The new matter set up in defendant's answer is insufficient as a defense, and is in no sense a cross-complaint which would entitle them to the relief prayed for. The cross-complaint contemplated by section 56 of the Practice Act (Cod. Sts., p. 38), must set up a cause of action against the plaintiffs as a cause of action and not as a defense. *Doyle v. Franklin*, 40 Cal. 110; *Jones v. Jones*, 38 id. 585; *Blum v. Robertson*, 24 id. 141.

Nor will the pleader be heard in this court to assert that it is a cross-complaint when he has pleaded it merely by way of defense. *McAbee v. Randall*, 41 Cal. 137.

A cross-complaint must within itself state facts sufficient to constitute a cause of action, and cannot be helped out by the averments of any other pleading in the action. *Collins v. Bartlett*, 44 Cal. 381; *Kreichbaum v. Melton*, 49 id. 55.

3. Proceeding now to the consideration of the new matter pleaded as a defense, we say that it was insufficient, and that the court below committed no error in striking it from the answer.

A fair construction of sections 2325 and 2326 of the Revised Statutes, and of the instructions of the commissioner thereunder, which are as much a portion of the act as if they were contained in the act itself (see § 2478, Rev. Sts.), makes it the duty of any one having an adverse claim to the applicant for a patent to file the same in the local land office within the period of publication and to commence suit thereon within thirty days and a failure so to do, is declared to be a waiver of such adverse claim. The act makes no exceptions, and whatever may be the nature of the adverse claim, if one exists, it is to be so made. If, as appellants contend, the muniment of their title was a judgment of a court of competent jurisdiction, it only rendered it so much easier for them to establish their claim. Any answer which failed to show that appellants had availed themselves of this right, unless they were prevented from so doing by positive fraud on the part of the applicants, is fatally defective. The maxim of the law: "*Vigilantibus et non dormientibus jura subveniunt*," applies with peculiar force to a case of this kind, where the statute has provided a remedy and provided adequate means for its protection and enforcement. *Dudley v. Mayhew*, 3 N. Y. 15; *Cofield v. McClellan*, 1 Col. 373; *Territory v. Ross Deegan*, ante, 82; *Pimental v. City of San Francisco*, 21 Cal. 354; *Peabody v. Phelps*, 9 id. 218; *United States v. Flint et al.*, Alta California, Sept. 11, 1876; *Shepley v. Cowan*, 1 Otto, 340.

The new matter set up in defendant's answer may be classified generally as consisting of two kinds or descriptions:

1. Matters tending to show that the grantor of respondents committed frauds upon the land office, which would vitiate his patent and,

2. Matters which appellants contend estop respondents from asserting their title.

As to those matters which, if true, would justify the government in recalling and cancelling the patent, they are clearly, under the authorities not sufficient to constitute a defense in this action. Any proceedings to annul the patent for these causes must be commenced by the government in its own name, through the attorney-general. *Mowry v. Whitney*, 14 Wall. 434; *Jackson v. Lawton*, 10 Johns. 24; *Gullipot v. Manlove*, 1 Scam. 156-161.

It is conclusive evidence that all necessary preliminary steps have been taken and proceedings must be instituted to directly attack the patent. *People v. Mansur*, 5 Denio, 397, 398; *Boardman v. Reed et al.*, 6 Pet. 328; *Houseman v. Hart*, 12 Johns. 77; *Smith v. March*, 6 Cow. 281; *People v. Livingston*, 8 Barb. 253; *Bradley v. Began*, 36 Barb. 533; *Minter v. Crommelin*, 18 How. 88; 9 Cranch, 98; 19 How. 332; *Wilcox v. Jackson*, 13 Pet. 511; *Gaines v. Nicholson*, 9 How. (U. S.) 364.

As to the scope and effects of patents, see *Moore v. Wilkinson*, 13 Cal. 486; *Yount v. Howell*, 14 id. 469; *Ely v. Frisbie*, 17 id. 250; *Doll v. Meador*, 16 id. 324-325 *et seq.*; *White v. Cannon*, 6 Wall. 448; see Mining Act, §§ 2325-2326.

Here, again, the appellants have been guilty of *laches*. If the proofs made by Agno in the land office were false, and he was attempting to procure a patent by false suggestion, this was a matter upon which appellants would have been heard in the land office, even after the expiration of the period of publication, and would have effectually prevented the issuance of the patent. See last sentence of section 2325 Rev. Sts. U. S.

2. As to the estoppels attempted to be pleaded in appellants' answer, they are wholly insufficient and not available to appellant as a defense in whatever light they may be viewed. The first estoppel pleaded is that by reason of the suit of *Frohner & Barta v. Rodgers et al.*, Agno was estopped from denying the right of Frohner & Barta to the Cannon and Cannon Extension lodes. Even admitting this to be so as between the Cannon lode and the Star of the West lode, it would be no bar or estoppel to the assertion of an after-acquired title. *Valentine v. Mahoney*, 37 Cal. 389; *Mann v. Rodgers*, 35 id. 316; *Montgomery v. Whiting*, 40 id. 294; *Mahoney v. Middleton*, 41 id. 41; Opinion of KNOWLES, J., on motion to dissolve injunction; *Gluckauf v. Reed*, 22 Cal. 468; *Cromwell v. County of Sac.*, 4 Otto, 351; *Russell v. Place*, id. 606.

3. Ejectment is merely a possessory action and determines no rights but those of *possession at the time*, and it matters not who has or claims to have the title. *Dutton v. Warschauer*, 21 Cal.

609; *Fogarty v. Sparks*, 22 id. 148; *Owen v. Fowler*, 24 id. 192; *Hawkins v. Reichert*, 28 id. 534; *Dimick v. Deringer*, 32 id. 488.

4. The second estoppel pleaded is the alleged tearing down of the notices and plat, posted upon the ground, and the declarations of Agno with reference thereto, whereby they (appellants), were induced to do work upon the premises, over and above what was necessary for the representation of the same to the amount of \$2,-500 or \$3,000. This is not sufficient to constitute an estoppel in any sense of the word. Appellants had no right to rely upon the declarations of one who was openly hostile to them. He occupied no fiduciary position toward them which would entitle them to credit his statements. They were not in a position where they were compelled to rely upon these statements, and might by application at the land office have readily ascertained whether they were true or false. They knew the premises had been surveyed, that application had been made, and that notice of the same was being published, or had been published, or if they did not have knowledge of this fact of publication, there is no allegation that they were prevented from knowing it through any fraud of Agno. *Biddle Boggs v. Merced, etc., Min'g Co.*, 14 Cal. 363, 364, 366, 368, 370, 372; *Ferris v. Coover*, 10 id. 589; *Fletcher v. Holmes*, 25 Ired. 458; Story's Eq. Jur., § 388. Opinion of KNOWLES, J., on motion to dissolve injunction. *Green v. Prettyman*, 17 Cal. 401.

5. These representations, if made, related only to the present intention or purpose of Agno, and being in its nature uncertain and liable to change, appellants had no right to rely upon it. Big. on Estop. 483.

6. The new matter set up in appellant's answer is also insufficient in that it does not show that they are in a position where they could themselves demand a patent from the United States, and unless appellants are in this position, they are certainly in no condition to demand a conveyance of our title, whatever may be their equities. See section 2326, Rev. Sts. (Mining Law): *Lee v. Somers*, 2 Oregon, 260. Opinion of KNOWLES, J. on motion to dissolve injunction in this case. *Dodge v. Perez*, 2 Sawyer, 645.

7. The new matter set up in appellant's answer, if for no other reason, should have been stricken out, because it is conflicting, contradictory and evasive. It avers in one breath that the entry was made before they had knowledge that the property had been relocated and its name changed; and in the next, that immediately after they had entered, on the 2d of September Agno came to them with the plat and notices in his hands, and made the declarations charged as an estoppel.

That they were prevented from making survey and adverse claim, by reason of the inclemency of the weather, and this when they say they did not know such survey and claim were necessary. The inclemency of the weather in the months of August and September and October, 1875, is something contradicted by the facts of which the court below was entitled to take judicial notice. And so throughout the entire answer they allege an estoppel in pais and long afterward ignorance of facts which, if the estoppel pleaded were true, they must of necessity have been conversant with. We need not cite authorities to the proposition that a pleading must be consistent, the one part with the other.

8. There was no error in striking off the amendment filed by appellants to their answer, for the reason that it set up no new fact, but the same facts which had been previously pleaded, with a little change in the phraseology. It did not obviate the defects in the original answer in any respect; and hence was properly stricken off. *Snyder v. White*, How. Pr. 321.

Besides, the allowing or disallowing an amendment is a matter of discretion in the court below, and is not a proper matter for revision in this court unless there has been a gross abuse of such discretion. *Stearns v. Martin*, 4 Cal. 229; *Polk v. Coffin*, 9 id. 58.

The system of disposing of mineral lands inaugurated by the act of July 26, 1866, and the amendments thereto, is *sui generis* and is to be interpreted with reference to the rights created; the method of their acquirement, the settlement of hostile claims, nor are the authorities quoted which grow out of the other public land laws applicable.

By the general land laws the department paid no attention to

the decisions of courts as to the right to occupy agricultural lands, nor did, under that system, any court have jurisdiction to determine conflicting rights. These could be settled after the patent in those cases, and hence that series of decisions growing out of such entries are almost wholly inapplicable to the mineral land system and are misleading.

The right to the mineral lands, the persons to whom and the circumstances under which such lands were given, the method of their acquirement and the protection accorded to such right, were all defined and particularly described by these acts; and all litigation as to inchoate rights were required to be settled prior to the issuance of the patent which was the final act in the *drama* of title. Where rights are so given, and remedies for their violation so prescribed, no other remedy is left open for a person seeking to acquire the right. See *Dudley v. Mayhew*, *supra*; *Almy v. Harris*, 5 Johns. R. 175; *McKeon v. Coherty*, 3 Wend. 494; *Stafford v. Ingersoll*, 3 Hill, 38.

Here the statute which gave the appellants rights, furnished the remedy which was adequate, and prescribed that unless it was in the manner prescribed invoked, the respondents were entitled to the patent. A failure to do the things prescribed it was provided should operate as a waiver of the adverse claim.

Now Agno professed to be the owner of this lode and entitled to a patent, and according to all these allegations the appellant had an adverse claim which was good, but which they waived. See § 2326, Rev. Sts. U. S.

The appellants are therefore asserting a stale claim which they have waived, and they are in this court instead of in the land office to have their waiver annulled, but no authority is given to this court to set aside the effects of such a waiver.

Their reason for having this waiver set aside is that they neglected to do that which the law which gave them their rights required they should do, and the court is asked to do that which in another manner they might have insisted on doing themselves.

KNOWLES, J. The first proposition I shall consider in this case

is: Was the demurrer to the new matter set forth in the defendant's answer properly sustained? The demurrer is in effect, that the new matter set forth in the answer, in no light in which it can be properly viewed, presents a proper defense to plaintiff's complaint. The first defense is, that of an estoppel by judgment record. To sustain this the answer alleges that the defendants, Frohner and Barta, located and become the owners of, by location, certain mining claims, known and described as the Cannon and the Cannon Extension claims; that John Rogers and others located the same ground as "the Star of the West Lode," and went into the possession of the same; that to recover the possession thereof, defendants, Frohner and Barta, brought an action, which was decided in their favor, and judgment of possession was awarded them under which the same was restored; that pending such litigation Agno, the grantor of plaintiffs, purchased the interest of the said Rogers and others in the said "Star of the West" location and went into possession of the said property, and undertook to defend said suit, and that he was therefore a privy in said action, and bound by the judgment therein. I agree to the proposition that the said Agno, under this state of facts, is estopped from setting up any claim or interest he may have acquired in "the Star of the West" location, from the said Rogers and others.

But it does not appear that the title in dispute in the case is that derived from "the Star of the West" location. In Big. on Estop. 523, I find this: "But in pleading or replying a judgment as an estoppel to an action or allegation more minuteness must be observed. It must now be made to appear that precisely the same point was in issue at the former trial, as that now in question, or there can be no estoppel."

The allegations setting forth the estoppel in this case did not show that the plaintiffs are claiming any thing by virtue of "the Star of the West" location. The trial of this cause shows that "the Star of the West" location was not in issue; that the plaintiffs in the case claimed nothing by virtue of the same, but claimed title to the same by virtue of a patent from the United States. Hence the judgment in the case pleaded could not have

worked an estoppel to the giving the same in evidence, and would have made no difference in this action. It is true that in the case of Barta and Frohner against Rogers and others, the right to the possession was determined, but that right in that case depended upon a different state of facts from that presented in this case. A party who has been adjudged to deliver possession of land to another claimant is not estopped from purchasing, subsequent to the action in which the right to such possession was determined, an outstanding title, and asserting again his right to the possession of the same. *Valentine v. Mahoney*, 37 Cal. 389; *Mann v. Rogers*, 35 id. 316; *Montgomery v. Whiting*, 40 id. 294.

There is nothing worthy of much discussion in the point that the subsequently-acquired titles of Agno should inure to the benefit of Frohner and Barta. They were not the purchasers of any title from Agno or Rogers *et al.* The doctrine that asserts that the subsequently-acquired title of one man inures to the benefit of another, applies only where the latter is a purchaser of a title from the former. The said judgment in favor of Barta and Frohner did not make them the purchasers of any title from Rogers *et al.*, or from Agno.

Each defense should be complete in itself. If a pleader does not wish to restate matters already pleaded in one defense, he should refer to such matters by appropriate words, and make them a part of any defense where he desires them to appear. *Moak's Van San*. Pl. 606; *White v. Cox*, 46 Cal. 169.

In considering the remaining issues presented by the answer, I find myself much at a loss. None of these defenses are stated separately, nor is either complete without referring to matters evidently averred and intended for another defense. The answer evidently unites several defenses, and a cross-complaint in what I think must be treated as one count. The defenses and cross-bill are not separately stated, but there was no demurrer to the answer for this reason. The defendants urge that the title of the plaintiffs had its inception in fraud of their rights; that Agno's location of the same was made while he was in possession thereof under "the Star of the West" location. This is true under the allegations in the answer, but the answer shows that this location

was made subsequent to the trial of the case between Barta and Frohner and Rogers *et al.* His rights under this location could not have been determined in that case. A party is precluded and estopped by any title he put in issue in a litigation, or which he might have put in issue, and by no other. *Mann v. Rogers*, 35 Cal. 316. The acquiring of mining ground by location is procuring such right by purchase.

Wash. on Real Prop., vol. 3, p. 4, says: "In one thing all writers agree, and that is in considering that there are two modes only, regarded as classes, of acquiring a title to land, namely: descent and purchase." Certainly no one would contend that when a person locates mining ground, he acquires a right to the same by descent. He must acquire it then by purchase. The fact that Agno made a location of this mining claim, while he was in possession under "the Star of the West" location, puts him in no different condition from what he would have been, had he purchased an outstanding title otherwise than by location at that time. I have shown in the cases of *Valentine v. Mahoney*, *Mann v. Rogers* and *Montgomery v. Whiting*, cited above, that he may do this. And how it would be fraud to do so I cannot see. It is alleged that Agno knew that defendants had the title to said ground, and that the same was not open to location. It is not necessary when a man buys in an outstanding title, for him to know that it is a valid title. And if he should not know that it was a valid title, or should know that it was not, I do not see how he can be charged with fraud. If his title was not a valid one, he would acquire nothing by it, and the person in possession of the property thus acquired would have a legal defense against the same. I have been unable to find any authority for the assertion that the person acquiring an outstanding title under such circumstances would be regarded as having committed a fraud even if he knew he had not procured the valid title by such purchase. The fraud, alleged to have been practiced by Agno upon the defendants in preventing them from contesting his application for a patent, will be considered under the plea of estoppel *in pais*. Taking the whole answer together, can there be enough extracted from it to show such an estoppel? The gist of the mat-

ters which can be treated as such a defense, are the alleged false and fraudulent representations of Agno. For Agno and those in privy with him to be estopped by these it must appear: First, that there were representations concerning material facts; Second, the representations must have been made with the knowledge of the facts; Third, the party to whom they were made must have been ignorant of the truth of the matter; Fourth, they must have been made with the intention that they should be acted upon; Fifth, they must have been acted upon. Big. on Fraud, 438; Kerr on Fraud and Mistakes, 93; *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 279.

There is no allegation in the answer that the representations of Agno were made with the intent that the defendants should act upon the same. To have set up a complete defense of estoppel *in pais*, the answer should have contained such an allegation. Moak's Van Sant. Pl. 336.

There are certain allegations of fraud in the answer which tend to establish a fraud upon the United States by Agno in procuring a patent to the ground in dispute. For this only the United States can attack the said patent. *Mowrey v. Whitney*, 14 Wall. 434; Wash. on Real Prop., Vol. 3, p. 180; *Field v. Seabury, et al.*, 19 How. (U. S.) 323. From the brief of appellants it appears that this answer should also be treated as a cross-complaint. A cross-complaint should certainly be set forth separate and distinct from those portions of the answer which are intended for defenses, and should be complete in itself. In order to find anything approaching a cross-complaint in this case portions of the answer must be referred to which were evidently intended for such defenses, as estoppel of record and estoppel *in pais*.

There is nothing in that portion of the answer intended for a cross-complaint which sets up title in the defendants, and I will have to refer to these allegations setting up an estoppel by record to find such allegations. But as the point was not distinctly raised by the demurrer, I will consider the whole answer and determine whether or not sufficient is alleged therein to entitle the defendants to the relief asked. The relief asked is a declaration that defendants and not Agno were entitled to a patent from the

United States, to the ground in dispute, and hence Agno occupied but the place of the United States and was only a trustee of the legal title for the benefit of these defendants, and the plaintiffs having notice of defendant's equities are also but similar trustees. I am aware of and fully recognize the legal proposition that where one person has procured a patent to any portion of the public domain from the general government, for which another party is entitled to a patent, that the former may be declared a trustee for the latter and adjudged to convey to him the legal title. But this latter person must show that in equity he is entitled to this conveyance. Generally speaking he would not be entitled to this conveyance unless he was entitled to one from the United States. The location of a parcel of mining ground in accordance with the United States law and the local laws upon the subject, does not entitle a person to a patent from the United States. He has the right to apply for a patent, and he only. It is a qualification for applying for a patent, similar to the right of citizenship, or the declaration of intention to become a citizen. Before a person, who has located a mining claim in accordance with law, would be entitled to a patent from the United States, he must make an application therefor under oath, and file therewith in the proper office of the land register, a plat and field notes of the claim, made by or under the direction of the United States surveyor general. He shall post a copy of such plat together with a notice of such application in a conspicuous place on the claim, and shall file an affidavit of two persons that such notice has been duly posted. Then the register of the land office shall publish the fact for at least sixty days, that such application has been made. Then the applicant shall file with the register a certificate of the United States Surveyor General that five hundred dollars worth of labor has been expended, or improvements of that value put upon the claim by him or his grantors. Then there must be an affidavit that the plat or notices have been posted up on the claim during the sixty days of the publication of the notice. Then if no adverse claim is made to the ground, the applicant is entitled to a patent

thereto upon payment of five dollars per acre therefor. U. S. Rev. Sts., § 2325.

It may be that where the title has passed out of the United States, a person might not be required to do all of these things, but certainly he ought to do every one of them that could and which would be of any avail. He ought to have a survey made of the same under the direction of the United States surveyor general for Montana.

It is true the cross-complaint shows that there was a survey made of the property by a deputy United States mineral surveyor, but it does not show that the survey was made under the direction of the United States surveyor general. There was no certificate procured from the United States surveyor general of Montana, showing that defendants had performed five hundred dollars worth of labor upon said claim.

There was no tender to the plaintiffs or Agno, of five dollars per acre for this ground. And there is nothing to show that the defendants should be legally excused from doing these matters. In fact there is nothing in the cross-complaint which would tend to show that defendants were entitled to a patent to this ground save the mere location of the same. The cross-complaint does not show an equitable title for a patent in defendants. Do the defendants set up in the answer a legal title in themselves? I suppose what the defendants would claim as allegations showing legal title in themselves, is the clause of the answer, numbered *eleven*, which commences thus: "Defendants further charge and allege that they were and are entitled to the exclusive possession and enjoyment of, etc." The allegation that a party is entitled to the possession of real property is a legal conclusion and not the allegation of a fact. *Payne and Dewey v. Treadwell*, 16 Cal. 221.

There might be matter enough set up in the allegations intended for a defense of estoppel by judgment record to amount to a plea of a legal title in defendants. If there were no objection to considering this, still, under the demurrer in this case, should this be treated as new matter constituting a defense?

Justice RHODES in the case of *Marshall v. Shafter*, 32 Cal.

177, holds this language: "It is proper at this point, however, to say that it is settled beyond all controversy in this State that the defendant may under the general denial give in evidence title in himself, and it follows that the allegation of such title in the answer does not constitute new matter, and therefore the allegations of title in the defendant do not present a new issue." In this case the denials of the defendants in their answer put in issue, the allegations of title in the complaint. Under this issue the defendants could have proven any thing that would have shown that plaintiffs had no title or were not entitled to the possession of said property. For this purpose they could have shown title in themselves or the right to possession in themselves. I do not controvert the proposition that when a person possessing the proper qualifications as to citizenship, locates, according to law, a mine, he receives by operation of law a grant to a mining easement to the same, and this grant gives him the exclusive right to the possession and enjoyment of such property for mining purposes. And I am of the opinion that this grant is what may be termed a legal right, and can be introduced in evidence in an action to try the right to the possession of a mining claim, although it is opposed by a patent from the general government. A patent is nothing more than a public grant evidenced by a deed. The title to this mining easement rests upon a grant, as I have said, and is evidenced by the facts of location and the law of congress. Whoever is prior in time where there are two grants, is prior in right. If the defendants, then, located the claim in dispute, according to law, before the grantor of plaintiffs located the same, they could have introduced the title thus acquired, in evidence in this case, under their general denial, and it would have prevailed, in determining the right to the possession against the patent of the plaintiffs. There is nothing to show, however, in the record that they ever offered in evidence any such title on the trial. The fact that defendants made allegations in their answer showing title in themselves according to the foregoing opinion in the case of *Marshall v. Shafter* will avail them nothing. According to that such allegations for the purpose of showing a legal title in them-

selves were not new matter constituting a defense. It was only surplusage or irrelevant matter when viewed in that light. The demurrer admits only so much of the new matter as goes to make a proper defense. A demurrer does not admit surplusage or immaterial matter. Moak's Van Santv. Pl. 783. If the answer then could be considered as setting up a legal title as new matter in defense, so far it must be regarded as immaterial and surplusage.

I now come to the question as to whether or not the plaintiffs were possessed of a legal title or only an equitable one at the time of the commencement of this action. There is no motion for a new trial; no record of the evidence introduced on the trial in this case. Hence according to the well-established rules in judicial proceedings, we cannot determine whether the findings of the court below were correct or not.

The cause was tried before the court without a jury, and the court finds that the plaintiffs were the owners of the premises in dispute in fee simple. We cannot go behind this finding.

On the trial it appears that there were exceptions taken to the introduction in evidence of a patent to Agno, from the United States of the ground in dispute, dated March 3, A. D. 1876, and a deed from Agno, to these plaintiffs, conveying the same, dated November 23, A. D. 1875. When this patent was delivered to Agno does not appear. There is no evidence in the record upon this point. This court cannot then presume that it was not delivered to Agno before the commencement of this suit. If these deeds do not have a tendency to show a legal title in the plaintiffs, then they were improperly admitted in evidence. If they had that tendency, then they were properly received. The granting part of the deed from Agno to the plaintiffs is as follows: "The said party of the first part for and in consideration of the sum of ten thousand dollars lawful money of the United States of America, to him in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released and conveyed, and by these presents does grant, bargain, sell, remise, release and convey unto the said parties of the second part and unto

their heirs and assigns forever, the following described tract or parcel of mining ground."

The covenants of warranty are as follows: "And the said party of the first part, and his heirs and assigns, hereby promise and covenant the title, and peace and possession of said property to warrant and defend against the lawful claims of all persons whomsoever." Taking these portions of that deed, and there is no doubt but that it purports to convey to the plaintiffs a fee simple absolute title to the mining ground in dispute. There could be no doubt that this is the scope of that deed were it not for another recital in the deed, namely: "This conveyance is intended and does convey all the title the party of the first part now has, as well as all title he may hereafter acquire by a patent from the United States, application having been made therefor." This recital, however, does not change the character of this conveyance. It does not place any limitation upon the title it conveys. In fact it only declares what in law would be the effect of such a deed under our statute. I do not deny that as far as the title the said Agno had to a patent from the United States, he could have had only an equitable title to the same, and so far as that patent title was concerned the deed only conveyed his equitable title to that patent title. But that is not the question here presented, namely: What title this deed in fact did convey, but what did it purport to convey? I answer that this deed must be classed as one that purports to convey the fee simple absolute title to this mining ground, for it purports to convey a title without any restrictions or conditions. It purports to convey such an estate as would pass to one's heirs at common law, and not to his administrator.

"A fee simple title is one that excludes all qualification or restriction as to the persons who may inherit it as heirs." 1 Wash. on Real Prop., 65-66. There is no qualification or restriction as to heirs in this deed. Purporting then to convey a fee simple absolute title to this ground in dispute, what was its effect upon the patent title that Agno subsequently acquired?

Our own statute (see Cod. Sts. 401, § 32) upon conveyance of realty is as follows: "If any person convey any real estate by

conveyance *purporting* to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterward acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

The recital in the deed of Agno only declared what was the effect of the deed under this statute, as soon as Agno received the patent from the general government. As soon as Agno received the patent to this ground from the United States the legal title he so acquired, by virtue of his deed to them, inured to plaintiffs' benefit. I am not obliged, however, to rest my conclusion that the patent title of Agno, acquired by his patent, inured to the benefit of the plaintiffs, upon the section of our statute above quoted. In the case of "*The Lessees of Harmer's Heirs v. George Morris and David Gwynne*," 1 McLean's C. C. R. 44, one Symmes executed a deed to Harmer to certain lots in what is now the city of Cincinnati, in the year 1791. In the year 1794 Symmes received a patent from the United States to these lots with other ground. McLEAN, J., says as to the effect of this subsequent title acquired by Symmes: "A deed having been given by Symmes to Harmer for these lots in 1791, when the patent was issued to Symmes for the same land in 1794, the deed of 1791 took immediate effect, and vested Harmer with the legal title." This case was affirmed in 7 Pet. 554; 10 Curtis' U. S. Sup. Ct. R. 558. STORY, J., upon this point, used this language in delivering the opinion of the court: "That the deed of Symmes to Harmer in 1791 passed a legal title to Harmer which became consummated in the latter when Symmes obtained his patent from the United States in 1794 is not controverted." Under many decisions according to the doctrine in estoppel, the patent title of Agno would inure to the benefit of the plaintiffs. Agno's deed to them being a warranty deed, it follows from this view that the introduction of these deeds not only had a tendency to establish a legal title in the plaintiffs, but that they did establish such title, there being nothing to show that Agno did not receive this patent before the commencement of this action. It was signed before that, and may have been and probably was delivered before that.

Whatever may be my views as to the abstract question of right in this case, and however much my disposition might impel me to do otherwise, I am satisfied that well-established principles of law force me to the conclusion that the judgment in this case must be affirmed.

It is ordered that the judgment of the court below be affirmed with costs.

*Judgment affirmed.*

WADE, C. J., dissenting. It is due to the importance of this case, and in view of the fact that the answer has been held insufficient, to set forth the allegations of the same more fully than has been done. The action was instituted by plaintiffs to recover possession of the Nellie Grant Quartz lode claim and for a perpetual injunction enjoining the defendants from working the same. The answer in substance alleges that the defendants on the 9th day of June, 1872, located the Cannon and Cannon Extension lodes upon the unoccupied and unappropriated lands of the United States, and that they acquired the right to the exclusive possession and enjoyment of such lodes under and in pursuance of the act of Congress of May 10, 1872. That while they were so seized and possessed of such lode claims and while the same were no longer open to exploration and occupancy by any other persons than themselves, one John Rogers in company with John G. Keith, William Lennox and A. J. Arnold wrongfully and unlawfully entered upon and ejected the defendants therefrom, and while so in possession relocated the same as the Star of the West lode. The defendants then instituted an action in ejectment to recover possession of the property. During the pendency of this action one Arthur B. Agno purchased of the defendants therein, who were so wrongfully in possession thereof, the Star of the West lode, and went into possession and agreed to defend the action. The cause was tried and resulted in favor of the plaintiffs (defendants herein) who were adjudged entitled to the possession of the property in question by virtue of the Cannon and Cannon Extension locations as against the defendants therein (Rogers & Company) who claimed under the Star of the West location.

Thereafter by virtue of a writ of restitution the defendants in that action were dispossessed and these defendants were restored to the possession of the Cannon and Cannon Extension lodes. Thereupon an estoppel by virtue of this judgment is alleged against Rogers & Company, their grantees.

It further appears that while Agno was so wrongfully and tortiously in possession of the Star of the West lode, and during the pendency of the action in ejectment and an appeal and *supersedeas* therein, he, conspiring with Rogers & Company to defraud the defendants and to avoid the consequences of such litigation and judgment, changed the name of the property and relocated the same as the Nellie Grant lode, well knowing that the defendants at the time of such relocation were entitled to the exclusive possession and occupancy of the property and that the same was not open to exploration and appropriation, being at the time owned by the defendants. Thereafter Agno fraudulently procured Meyendorf, one of the plaintiffs, a deputy mineral surveyor, to survey the Nellie Grant lode for the purpose of procuring a patent thereto, and the plaintiffs, with the full knowledge of all the rights and equities of the defendants, purchased the Nellie Grant lode and received a deed therefor. To aid this fraudulent design to procure a patent and while the property was so in litigation and in the possession of Agno, and while the defendants were at the city of Helena, eighteen miles distant, attending to such litigation, the plat and notices were placed upon the property, and immediately and within five days thereafter and long before the defendants knew that the name of the property had been changed and the same relocated, it became impossible, by reason of deep snows in the mountains and extreme cold and stormy weather, to obtain access to the property and make survey of the same, if an adverse claim became necessary.

Agno represented to the defendants that the Nellie Grant lode did not embrace any of the Cannon or Cannon Extension lodes, and the survey of the Nellie Grant lode, as shown by the field notes and official plats on file in the surveyor-general's office do not show the *locus* of such claim to interfere with or to embrace any of the Cannon or Cannon Extension lodes, all of

which records, survey plats and field notes were so done and executed for the purpose of deceiving and defrauding the defendants, who were at the time ignorant of such design and relied upon such representations.

While Agno was thus wrongfully and tortiously in possession of the property and wrongfully excluding the defendants therefrom by virtue of false affidavits concerning his occupancy and possession of the property and his compliance with the laws of congress and the rules thereunder, he placed himself in a position to apply for a patent to the property. The defendants, after discovering the *locus* of the Agno location, filed their *caveat* and certified copy of the judgment-roll in the ejectment case with the proper officer who erroneously disregarded the same.

It appears that the plaintiffs procured Agno to do and perform the fraudulent act charged against him for the purpose of fraudulently procuring a patent for the property when the same belonged to the defendants. After the defendants had been placed in possession of the property by virtue of the writ of restitution Agno went upon the premises and tore down his notices and plat and gave them to the defendants, and willfully and with the intent to deceive and injure the defendants said to them that he had abandoned his application for a patent and that in the future he would lay no claim to the property, and that he had done with interfering with the property, and that he had no right to do what he had done in attempting to defeat the judgment in the ejectment action. And relying upon these representations and the good faith of the same the defendants performed a large amount of work upon the property that they otherwise would not have done; that he also fraudulently and falsely represented that his survey and claim did not embrace the lode claims of the defendants, and that he would not and should not claim any part of the same; that these representations were made just before the time expired for the interposition of an adverse claim; that but for such representations the defendants would have ascertained the conflict as best they could (the same being then unknown to them), and interposed their adverse claim and maintained their title and obtained a patent to the

property ; that such representations were false and were fraudulently made to prevent the defendants interposing their claim, thereby to enable the plaintiffs to procure their patent ; that the plaintiffs had full knowledge of the facts at the time they received the conveyance from Agno and are estopped from asserting the title so fraudulently obtained, which title is a cloud upon the defendants' title and is being injuriously used against them by plaintiffs by invoking the equitable interposition of the court to grant the injunction herein.

All these facts and allegations of the answer material to the issue were by the demurrer thereto admitted and the demurrer sustained, and this decision of the court below is by the majority opinion herein affirmed.

1. In my judgment this opinion assumes as a fact the very question to be tried in the case ; it declares : " But it does not appear that the title in dispute in this case is that derived from the Star of the West location." This oracular assertion assumes as a fact the important question that the answer seeks to present for determination, and the decision seems to be based upon this assumption and the one following it, that Agno held the Nellie Grant location by a title subsequent to the judgment in the ejectment case. The question is do the allegations of the answer warrant these conclusions ? Does not the answer conclusively show that the title under which the plaintiffs' claim was derived from the Star of the West location, and was not the Star of the West title concluded by the judgment ? Was the Nellie Grant title a new and subsequently acquired title ? To answer these questions it becomes necessary, in the first place, to determine what effect is to be given to the judgment in the ejectment case. It is conceded that the patent to the plaintiffs' grantor, Agno, carried with it the legal title to the property, but the defendants seek to show by their answer that they are entitled to the beneficial estate therein and ask the interposition of the equitable jurisdiction of the court to protect them in their possession and award affirmative relief, should it appear proper to do so. For this purpose they first plead the ejectment judgment. That judgment was good as between the parties as to all the probative

facts put in issue. It determined every thing necessary to a recovery on the part of the plaintiffs in that action who are the defendants herein. It established their right to the identical property in controversy at the time. It consequently devolved upon the respondents, the plaintiffs, to show a new title. But in making a new location or in changing the name of an old one as in this case they cannot again put the plaintiffs in that action to proof of the very matter they then litigated. They cannot again call upon them to establish their location and right of possession at the time this judgment was rendered. It was between the same parties and privies, involved the right of possession to the same property, and determined that at the date of its rendition the plaintiffs in the action were entitled to the possession. Being so entitled at that time how did they lose their title, and how did the respondents acquire that by which they claim the property? As the answer discloses by taking wrongful and fraudulent possession of the property, and while the right of possession was being tried, and during the pendency of the action for that purpose, relocating the property and changing its name in pursuance of a conspiracy to defraud the appellants and to avoid the consequences of a judgment, awarding to them the possession of the property. I am unable to see how by these fraudulent and wrongful acts, the appellants lost their title, or how a valid new title was acquired by the respondents. Of course if there was a valid new title, it was not concluded by the judgment, but that is the very question presented in the answer, by showing in what this new title consisted, and how, if at all, it was acquired. Was there a valid new title acquired by respondents after the judgment? The Star of the West location was a fraud. The possession acquired thereby was tortious and wrongful. So the court adjudged in the ejectment case. But this possession so acquired was made the basis of the Nellie Grant location, without which no location could have been made by Agno, and without which no patent could have been issued to him. How is a patent to a mineral lode claim acquired? By making a lawful location, taking actual possession thereunder, and performing the necessary amount of labor thereon. Now as to the Nellie Grant location,

the possession that supports it was taken under the Star of the West location and all the labor performed thereon by Agno, for all that appears, was performed while the lode was called the Star of the West lode, and as to such labor and possession they are both concluded by the judgment, and as to Agno his grantees and privies are as if no possession had been taken and no labor performed.

And so the question is presented whether a party can suspend the rights of his adversary, and while they are so suspended and his hands completely tied, acquire a valid and unassailable title to the very property in dispute. The Star of the West location and the possession thereby acquired being an indispensable requisite to the validity of the Nellie Grant location, it follows that if the Star of the West location was fraudulent and void, that of the Nellie Grant must be equally so, the Star of the West location being but a link in the chain of title to Agno, and if the judgment is conclusive as to the Star of the West location, it must be equally so as to that of the Nellie Grant.

The case of *Mann v. Rogers*, 35 Cal. 316, cited as authority in support of the title acquired by Agno under the name of the Nellie Grant lode, is not in point. It lacks the very element that renders the Agno title invalid. It does not call to its support the tortious possession without which Agno could not have acquired the Nellie Grant title. It required the unity and use by Agno of his entry under the Star of the West title, and the retention of the possession thereunder by appeal, and *supersedeas* to enable him to lay the foundation and build up his Nellie Grant claim. It will be seen from the above case that there was at the time of the litigation between Mann and Rogers a present subsisting operative title by grant in Valligo. This title was purchased by Mann. It was an available title independent of any of the rights of the respective parties litigated in the action. In the case at bar Agno seeks to build up a right out of a possession that was being litigated and which he wrongfully held by force of the appeal. So in the case of *Valentine v. Mahoney*, 37 Cal. 389, referred to in the opinion of the majority of the court, the subsequently-acquired title was an outstanding available title drawing with it the right of possession.

An after-acquired title may be a naked title without any beneficial interest, or a right of possession alone. In either case it is capable of being enforced in connection with the rights that are alone incident to the character of title acquired. If the same tortious possession is invoked to support the title, and without its aid one cannot be produced, the claim must fall for want of legal support. Stripped of the possession upon which alone he can found the Nellie Grant title and he has nothing left. Had he been dispossessed under the writ of restitution or surrendered the possession of the Star of the West before the litigation was terminated he could then have relieved himself of the binding force of the judgment and established a new claim independent of the possession held by reason of the appeal, and this is the doctrine announced in *Montgomery v. Whiting*, 40 Cal. 294. No one doubts but that a person in possession may buy up an outstanding title and avail himself of it. But this outstanding title must carry with it the right of possession. He cannot buy up an outstanding title that is not coupled with the right of possession if he is a trespasser, for this will not aid him in defense of his possession. His tortious possession cannot assist him in such a case. He cannot use to his benefit the very trespass he is seeking to maintain, and thereby change the legitimate results of the controversy. He cannot use the process of the court and the remedies afforded by it, to hold wrongful possession of the property, and at the same time make the possession so held the basis of requiring a superior right over his adversary. He cannot make his trespass work a forfeiture, nor build up a title on such a basis. The title acquired must be a valid and available one, such that might be shown to exist in a stranger and defeat a recovery in ejectment. It must be one that carries with it the right of possession and capable of being enforced. I will give an instance that presents the present case in its true light, as distinguished from those cited by the court. Suppose A. was the owner by location of the Nellie Grant lode, but had not been in possession for a year, and could not under our statute maintain ejectment, but if in possession could successfully defend against such action. After his absence for a year, B. enters upon and takes possession

of the property and subjects it to his dominion. Within a few weeks C. forcibly enters and evicts B. To regain the possession thus wrongfully taken from him, he institutes his action of ejectment against C. In order to defeat this action, C. purchases the title of A. and expects by the unity of his tortious possession with A.'s title to successfully defend. To allow such a doctrine to prevail, C. instead of being placed at a disadvantage, by reason of his trespass, is favored on account of it, and a stale, unavailable title is made good in the hands of a wrongdoer, by the commission of a wrong. Now, as averred in the answer, this is just what Agno is seeking to do. The determination of the suit shows that his possession was tortious, and yet by appeal and *supersedeas* he makes it the sole origin of the Nellie Grant title. When we come to look for the Nellie Grant claims there is none in being until it is brought into existence out of Agno's tortious possession. By it he makes the change in the name and stakes — changes the inscriptions on the corners — procures a survey, and is enabled to make his record and apply for a patent for the identical property adjudged to belong to the defendants. If he had returned the possession he might never have been able to have secured a foothold upon the premises thus surrendered up. But if he had, and made it the basis of a new title, a new suit might possibly have been necessary to determine his right. But until this tortious possession is restored, he cannot lay a new foundation for a new title. He cannot build a new title upon the old foundation. The old foundation of his title, the Star of the West location, and the possession thereunder was concluded by the judgment. He was bound by this judgment so far as this location was concerned, and the Nellie Grant location being born of the Star of the West location, which had been adjudged void, was itself void. See *Atherton v. Fowler*, 6 Otto, 513, where the court holds that a naked, unlawful trespass cannot initiate a right of pre-emption in the public lands. The trespass of the Star of the West location could not therefore initiate the right to the Nellie Grant location.

A judgment which binds the rights of the parties is as effectual as a release or a confirmation by one party to the other. It

is conclusive of the right and establishes the obligation in ejectment to return the property. But for this rule successive transfers and alienations of the property would forever prevent a determination of the controversy. No one would contend that the judgment was either a bar or an estoppel to a subsequently-acquired title. But the question presented here is, whether Agno, by his entry under the Star of the West title, could by appeal and *supersedeas* stay the execution of the writ of restitution and under this entry and possession change the name of the same property and acquire a new title, we think it clear that he could not. The right of possession was the question under the laws of congress and the Territory that was litigated, so far as this right is concerned it was decided in favor of appellants. The issuance of the patent after the possession under the judgment conferred no new right in this respect, and was under the particular facts of this case a bare naked legal title which did not carry with it the beneficial estate. The judgment should therefore prevail as an estoppel in a court of chancery and operate as effectually as a release or confirmation by the patentee made prior to the issuance of the patent. That the judgment may not have been effectual before the land officer is no reason why it should not prevail in a court of chancery where the equitable rights of the parties are invoked according to the rules and practices of such tribunals. A patent may convey the bare naked legal title while the entire equitable interest and estate may be in another ; such a case would arise where by a judgment one party is decreed to be the owner and entitled to the possession of property the title to which was in another, and that is the situation of the parties to this case. The judgment determined every right possessed by the parties anterior to the issuance of the patent and leaves the patent simply evidence of the naked legal title while the beneficial interest in the property remains in appellants. In such cases the issuance of the patent confers no new title. It is conclusive in a court of law but does not determine the rights of the parties in a court of equity where the holder of the legal title may be decreed a trustee for the equitable owner. The patent issued to Agno. He obtained it by reason of his wrongful possession and perjury, while

the appellants were the real owners of the property. How, then, could he obtain any beneficial interest in the property short of holding possession until a title ripened under the Statute of Limitations, which statute he could not invoke while the property and the right of possession was held by operation of *supersedeas* pending the suit as charged in the answer. If, by the operation of the *supersedeas*, Agno could hold possession and right of possession during its continuance and acquire a title because the party against whom it run could not successfully prosecute the very kind of action it is claimed the law requires, it is simply permitting the Statute of Limitations to run during the pendency of an action to determine this right. The patent is not in fact a new title. If so, in what is it founded? No new entry was made. The old one alone is its basis. It had never been surrendered nor had the writ of restitution dispossessed Agno until after all the foundation he claims for the patent had been laid. After he was dispossessed nothing was done except the bare issuance of the patent.

Estoppels *in pais* are of an equitable character and dependent upon the facts and surroundings of the particular case. When a judgment is so connected with the parties and the subject-matter as that for the purpose of preserving a right it ought in equity to prevail, it becomes in fact and effect an estoppel *in pais*. Because it is a judgment which may not be pleaded as a bar, it does not lose its efficacy as any other fact or act on account of its bearing in the case as an estoppel, and the true situation and relation to the controversy may be shown to ascertain its effect and to give to it its proper bearing. It may be good for one purpose and not for another. The relations of the parties to it, the reliance placed upon it by them may make it good when otherwise its effect might be avoided. A party may acknowledge that it is valid under such circumstances as will not permit him to gainsay it. So it may have such a bearing from its particular relations to the controversy that in good conscience it ought not to be ignored. And such was the relation of this judgment to these parties. The defendants' rights had been established; they had been decreed the owners of the property. Agno knew this.

He had in reality become a party to the suit, and to rob the defendants of their property and to set at naught this judgment awarding them the possession, he in company with his confederates entered into the conspiracy disclosed in the answer. In good conscience he ought to be estopped by the judgment.

The judgment having established the right and title of appellants at the date of its rendition, the question is not whether the alleged fraud of Agno operated to defeat his title, but should not operate to prevent a forfeiture of appellant's title? It may be that the rule laid down by the court in reference to the doctrine of estoppel would be good when a prior equitable and legal right is made to yield to a subsequently asserted one, but we deny its applicability to a case where the alleged fraud is sought to be made available to create a forfeiture of a prior equity and prior right. In the one case the question presented is whether the fraud shall operate favorably to the acquisition of a right by defeating the title of the party defrauded, in which case we hold that the rule laid down by the court is greatly relaxed. In the other case it is applicable where a valid subsisting right not founded in fraud is lost by reason of a fraudulent act of the owner. A bare suggestion of the situation of the parties with respect to the property in controversy shows the utter inapplicability of the rule invoked. In the one case the party is allowed to acquire a right by the very acts that are alleged as constituting the estoppel, and in the other the party has the right and the estoppel is invoked to prevent its forfeiture. The real question is, did Agno acquire any rights against appellants by the perpetration of the alleged fraud? If he has acquired any legal advantage by reason of it, is it not subservient to the equitable rights of the defrauded party? If A., the owner of land, conveys it to B., but the deed is not recorded, and C. procures another deed with notice of B.'s rights, will it make any difference what C.'s object was? He is estopped because *per se* the act would be a fraud to allow it to stand.

2. Besides all this Agno and his privies are estopped even by the rule laid down by the court. He made false representations in material matters to the appellants. He made them with full

knowledge of the facts, and the parties to whom they were made were ignorant of the truth of the matter. The representations were made by Agno with the intention that they should be acted upon by appellants, and they were acted upon by them. Because of such representations, false field-notes, surveys and record, they failed to file their adverse claim, and the representations were made willfully and fraudulently to cause such failure in pursuance of a conspiracy to defraud appellants of their property. For the same purpose Agno entered upon the property, tore down the notices and declared to appellants that he had done wrong to interfere with their property and that he should make no further claim thereto, and this in pursuance of the same conspiracy to defraud appellants, and they, acting upon these representations and acts of Agno, failed to file their adverse claim and went forward and performed a large amount of work on the property. All this appears in the answer, and its allegations contain all the elements of an estoppel *in pais*.

3. The notice of the Nellie Grant location, the survey-plats and record in the surveyor-general's office, as the answer alleges, were purposely so drawn, made and entered that they failed to show that this location came in conflict with the Cannon and Cannon Extension locations. They represented a falsehood for the purposes of fraud. They were made to harmonize with the acts and representations of Agno when he tore down the notices and declared that he should make no further claim to the property, and for the same purpose of deceiving and defrauding the appellants. But if the notice, survey, plat and record had been honest and proper showing a conflict between the two locations, the appellants, under the circumstances, would have been relieved from filing an adverse claim. They were the owners of the entire equitable interest in the property, but their rights, by reason of the fraudulent acts of the respondents, had been suspended. The statute does not provide for an adverse claim upon equitable grounds, but limits it exclusively to such actions as will determine the right of possession. The right of possession may be suspended or it may not set in until some equitable right is adjudicated, but there is no provision under the Mineral Land Act for the

trial of equitable titles of this character, and consequently there is no bar to such actions when, according to the rules of equity, they should be entertained. A party may be finally entitled to the possession, when at the time he is required to interpose his adverse claim he would not be entitled to such possession, which is the only question that can be tried under the act. Then is the equitable right lost by failure to file an adverse claim, when the trial to result from such claim can in no manner affect the equitable right? By the appeal and suspension of the writ of restitution the right of the appellants to possession was suspended. The right was not restored until after this writ became operative, and the answer clearly shows that no new title or right of respondents set in since that time. Both his entry and application for a patent under the charge in the answer were during its suspension, and while a motion for a new trial was pending. There might be some plausibility that such a new right had been acquired as would have required appellants to interpose an adverse claim under the notice, if the notice had been given after and the judgment and right of possession under it were capable of being enforced. When a party is not entitled to the right of possession, he cannot maintain an action when the issue involves solely the right of possession. The necessity of interposing an adverse claim is determined by the right the party may at the time have to the possession. When a recovery upon his right of possession could not be had, he is not required to interpose an adverse claim. Such claim presupposes the right of possession and lays the foundation for the trial of such right. Nor would a judgment so suspended show right of possession. The party finally to be adjudged entitled to possession and restored thereto could not assert and maintain his right, while the operation of the judgment and writ of restitution were suspended. During such suspension the respondents who were in possession were entitled to the possession at the very time it is claimed the appellants should have interposed and brought an action that they could not maintain.

Nor was an adverse claim necessary. Merely changing the name of the property under the circumstances disclosed, without

surrendering possession thus held under the Star of the West location, gave no new right, and left the status of the parties as if the application for the patent had been made under the Star of the West location, while the appellants' right to the possession under the judgment had been suspended.

But if it had been necessary for the appellants to have filed an adverse claim in order to protect their title, they were excused from so doing for the reason that they were not properly notified of the Agno application for a patent. The pretended notice was not sufficient to require them to take any action in the premises. The averment of the answer in substance is that the plaintiffs, conspiring to defraud the defendants, and to cause them to forfeit their title by failing to file an adverse claim, made the official survey, field-notes and official plats of the Nellie Grant location on file and among the records of the surveyor-general's office, to show that such location did not conflict with the Cannon and Cannon Extension locations, or what is equivalent thereto, to fail to show that it did so conflict. With this record, survey and plats admitted to have been so made and drawn for the purposes of fraud, the plaintiffs, to further mislead and deceive the defendants, informed them the Nellie Grant location did not conflict with or embrace any part of the Cannon or Cannon Extension locations, and that they should make no further claim to the defendants' property. The false record, survey and plats they had made, and their false representations were in perfect harmony, and both were in pursuance of a matured conspiracy to fraudulently obtain title to the defendants' property. The defendants had the right to look to the records of the surveyor-general's office, to ascertain if their property had been relocated, or in any manner infringed upon by the plaintiffs or others. The notice posted on the claim necessarily partook of the fraudulent character of the field-notes, plat and survey, and was, in truth, no notice at all, and was not intended to be. It did not call upon the defendants to protect their rights, for it did not show that they were imperiled and did not afford any basis for an adverse claim. This notice was intended by the law to give information instead of concealing it. Acting as a Statute of Limitations, and intend-

ing to cut off the right to claim the property after the expiration of a limited period, it ought clearly to designate what property is claimed, and if it fraudulently conceals the property in order to prevent inquiry and claim, it is no notice.

4. Much is said in the opinion of the court to show that the answer does not contain allegations sufficient to entitle the appellants to a patent, and therefore that the respondents cannot be compelled to convey to them. In other words, that there is not sufficient alleged to entitle appellants to the affirmative relief demanded. It must, however, be remembered that the respondents are seeking to recover by virtue of their own title, and demanding that appellants be perpetually enjoined. They must recover upon the strength of their own title, and not upon the weakness of that of their adversary. If the answer contains a defense it is not subject to demurrer, because it does not state facts sufficient to entitle the defendants to the relief demanded. If it contained sufficient to defeat the plaintiffs' action it is a good answer. It is sufficient to defeat the plaintiffs' action if the answer shows that the defendants are the owners of the equitable title to the property while the plaintiffs hold the naked legal title, or that the plaintiffs are estopped from claiming title by reason of the judgment or *in pais*, even though there had been no demand for affirmative relief. If the patent to Agno prevented appellants from applying for a patent, as it did, and also from taking any steps in that direction, then they were excused from so doing. The law does not require them to do a vain thing; and though they were entitled to a patent they could not procure one while that to Agno was outstanding, or while the property was in his possession, and held there by a suspension of the writ of restitution, and so they were excused from making the effort. All they could do is what they have done at the first opportunity, to show that they were the owners of the equitable interest in the property, and that Agno was trustee for them, holding the legal title for their benefit. Showing this they defeat the plaintiffs' action. By the Cannon and Cannon Extension locations, the property was granted by the government to the appellants, which grant was kept alive and in full force by possession and work upon the

claims, and thereby they became entitled to the exclusive right to take the necessary steps to apply for a patent, and the government having parted with this beneficial interest in the property, and the grant to the appellants never having been divested, there was no room for a second grant to any other person, for as to this property, it had nothing to convey but the naked legal title which it or its grantee held or holds as trustee for the real owner.

A patent is not conclusive evidence of title in a court of equity. The adjudication of the land office is not in all cases final. That tribunal determines and the patent appropriates the legal title, and where the question depends upon that title alone such appropriation is conclusive. But this leaves untouched the equity jurisdiction of the courts to go behind the patent, and if the facts warrant, to make the owner of the legal title but a trustee for the equitable owner, or otherwise to modify or adjust the rights of the parties and decree accordingly. Where the government has parted with its title, and the question becomes one of private right, courts of equity, for the purpose of relieving against fraud, accident or mistake, may look behind a patent and decree in favor of the real owner, though the legal title may be held by another. Where the officers of the land office decide controverted questions of fact in the absence of fraud, impositions or mistake, their decision on the question is final, except it be reversed on appeal in the land department. Fraud, impositions or mistake may be presumed to exist so as to give a court of equity jurisdiction, when the land office issues different patents to different persons for the same property; or when it issues a certificate for a patent which is evidence of a governmental grant, to one person and the patent itself to another for the same property; or when the government having by its valid grant (as in this case by virtue of the Cannon and Cannon Extension locations) conveyed the property to one person, by a title equivalent to a patent, and should thereafter, while such grant remained vested and in full force, convey the same property by patent to another. In all such cases the patent is not conclusive, and courts of equity have jurisdiction to go behind the patent and ascertain

who is the real owner, and decree accordingly. *Johnson v. Towseley*, 13 Wall. 81. And so if the answer did not contain averments which entitled the appellants to the affirmative relief demanded, the court had jurisdiction to try and determine the defense that was sufficiently alleged, and the demurrer to the answer should have been overruled.

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NATIONAL MINING Co., appellant, v. POWERS, respondent.

TITLE TO LAND BY ADVERSE POSSESSION — *Statute of Limitations* — *fence*. In 1872 A. bought of B. a dwelling-house and other buildings which were upon a mill site of C., a foreign corporation. C. received a patent thereto from the United States in 1869. Afterward A. inclosed these improvements with a good and substantial fence in 1872, and resided on said tract without interruption until April, 1876, when the agent of C. asserted its title to the premises and demanded rent therefor. A. testified on the trial that she always claimed to be the owner of the property, and the agent testified that he did not know that she so claimed it until April, 1876, but knew that she built the fence and occupied the premises from 1872 until October 1, 1876, when C. commenced this action. *Held*, that the possession of the tract inclosed by A.'s fence was adverse to the rights of C. *Held, also*, that this action was commenced more than three years after the right to bring the same accrued, and was barred by the Statute of Limitations of this Territory.

SAME — *declaration of A.'s grantor*. Upon the trial C. offered to prove by B. that he told A. at the time of the sale in 1872, that he had no interest in the land and could sell the buildings only; that C. owned the land and the buildings had been erected by permission of C.'s agent. *Held*, that this testimony did not affect the legal relations of A. and C. after the erection of the fence, and was therefore inadmissible.

*Appeal from Third District, Lewis and Clarke County.*

THIS action was tried by WADE, C. J., with a jury.

CHUMASERO & CHADWICK, for appellant.

While possession of property is *prima facie* evidence of title, such possession avails nothing if it appears that the title is in a party out of possession, unless the Statute of Limitations can be

applied. In order to render the statute applicable, such possession must be adverse to the legal title. Cod. Sts. 515, § 4.

Adverse possession must be accompanied with the claim of the fee. Tyler on Eject. 851 *et seq.*; *Humbert v. Trinity Church*, 24 Wend. 586; *McClellan v. Kellogg*, 17 Ill. 498; *Green v. Neal's Lessee*, 6 Pet. 291; *Ewing v. Burnet*, 11 id. 41; *Harvey v. Tyler*, 2 Wall. 328.

The fact of possession and its character are the tests. Tyler on Eject. 860, 870-872; *Taggart v. Stansberry*, 2 McLean, 543; *Jackson v. Andrews*, 7 Wend. 152; *LaFrombois v. Jackson*, 8 Cow. 609.

It must be hostile in its inception. Tyler on Eject. 874-877; *Turney v. Chamberlin*, 15 Ill. 271; *Kirk v. Smith*, 9 Wheat. 241; *Brandt v. Ogden*, 1 Johns. 156; *Jackson v. Sharp*, 9 id. 163; *Guy v. Moffat*, 2 Bibb, 507.

A claim or title which cannot be set up by a person while in possession cannot be set up by one who comes into possession under him. *Jackson v. Harden*, 4 Johns. 202; *Tompkins v. Snow*, 63 Barb. 525.

A license given by the owner is a perfect answer to the claim of adverse possession set up by licensee or purchaser under him. *Luce v. Carley*, 24 Wend. 451; *Babcock v. Utter*, 1 Abb. 27; Tyler on Eject. 860, 879, 880.

Where party is in possession in privity with the owner, nothing short of open and explicit disavowal and disclaimer of owner's title, and assertion of title in himself, brought home to the owner will satisfy the law. *Zeller's Lessee v. Eckert*, 4 How. U. S. 289.

The court erred in excluding the testimony of respondent's grantor. *Jackson v. Bard*, 4 Johns. 230.

The proof showed that respondent's possession was not hostile in its inception, or accompanied with any claim to the fee. Respondent entered subject to appellant's title. Angell on Lim., §§ 441, 442; *Jackson v. Davis*, 5 Cow. 123; *Jackson v. M'Leod*, 12 Johns. 182.

E. W. TOOLE, for respondent.

No license was pleaded. It should have been set up in the

replication if it could be made available to defeat the operation of the Statute of Limitations. Pomeroy on Rem. 712, 734.

Respondent does not avail herself of the possession of her grantor. She claims, by virtue of four years' adverse occupancy and never recognized the license of appellant. Angell on Lim., §§ 313, 314; Cod. Sts. 515, §§ 3, 4, 6, 7.

When did appellant's right of action accrue? Appellant never asserted any title against respondent until a demand for possession was made in April, 1876, and respondent never recognized appellant's title. Cod. Sts. 393, § 6; Angell on Lim., §§ 369, 380, 384, 395, 414, 439; Tiffany & B. on Trustees, 717; 1 Pars. on Cont. 509, 514; Addison on Torts, 395, 403; Whart. on Ev. 1337, 1338; *Vansickle v. Haines*, 7 Nev. 249.

Appellant's right of action accrued more than three years before the commencement of this action. Respondent's purchase of her grantor was a notice to appellant that she claimed adversely. 1 Washb. Real Prop. 537-539; Smith's Landl. & T. 217.

BLAKE, J. The complaint alleges that the appellant on October 1, 1876, was seized in fee and the owner of and entitled to the possession of certain lots of land which were within the boundaries of the appellant's mill-site; and that the respondents entered into the possession of the premises and unlawfully withhold the possession thereof from the appellant. The answer denies these allegations and says that the respondents and their predecessors in interest have occupied and possessed the lots since 1865; and that they have occupied the same adversely to the appellant and all persons more than three years before the commencement of this action. The appellant's replication denied the averments of the answer.

Upon the trial the appellant introduced in evidence a patent from the United States to the appellant to said mill-site, which embraced the lots that were described in the complaint. The patent was dated October 27, 1869. In 1872 Mrs. Powers, one of the respondents, who was the real party in interest, purchased of Joseph Codling a dwelling-house, stable and chicken-house, which were on the land in controversy. The husband of Mrs.

Powers was made a party defendant in this action and is the respondent also. Mrs. Powers made a peaceable entry upon the premises as soon as she paid therefor, and afterward in 1872 put a good and substantial fence on the land, and has improved and cultivated the same ever since and occupied and used the buildings thereon. The appellant is a foreign corporation which has a place of business in this Territory. During this period the agent and superintendent of the appellant knew that Mrs. Powers was living upon the premises and improving the same, and that she had built said fence, but never demanded any rent or asserted any title thereto until April, 1876. Upon the trial Mrs. Powers testified that she always claimed to be the owner of the premises and never heard that her title was disputed by any person until September or October, 1876. The agent and superintendent of the appellant testified that he never heard that either of the respondents was claiming said land until April, 1876.

The court below entered judgment on the verdict of the jury for the respondents.

Before we consider the errors which are complained of by the appellant, we will refer to the statutes, which are applicable to the case and are contained in the chapter relating to "Limitations." Cod. Sts. 514.

"Any peaceable entry upon real estate shall be deemed sufficient and valid as a claim unless an action be commenced by the plaintiff for possession within one year from the making of such entry, or within three years from the time when the right to bring such action accrued." § 3.

"In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of the premises by another shall be deemed to have been under such legal title, unless it appear that such premises shall have been held and possessed adversely to such legal title for three years before the commencement of the action." § 4.

"When it shall appear that there has been an actual continued occupation of the premises under a claim of title, exclusive of any

other right, but not founded upon any written instrument or judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely." § 6.

"For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: First, when it has been enclosed by a good and substantial fence. Second. When it has been usually cultivated or improved." § 7.

It appears from the transcript that Codling executed a bill of sale to Mrs. Powers of the dwelling-house, stable and chicken-house, but did not make a deed of the land in dispute. It does not appear that this instrument was delivered to either of the respondents, or accepted by them. The claim of Mrs. Powers to the tract of land which she inclosed by a fence is not founded upon any written instrument, judgment or decree.

The appellant contends that the court erred in giving certain instructions, and refusing to give one, which the appellants asked to be given to the jury. We think that all the questions which have been discussed by counsel are determined by the interpretation of the statutes *supra*. The court below followed these statutory provisions, and made no modifications thereof, and therefore committed no error. Upon the matters of law that are involved in this action, the reports are full of decisions, which are based upon the statutes regulating the subject. Mr. Tyler gives the following rule: "Whenever the statute declares what shall constitute the possession adverse, the question is settled by a reference to the statute, and the decisions of the courts which have been made under it. But, when the statute is silent upon the subject, the question is settled by general principles which have been sanctioned and established by the courts." Tyler on Eject. 852.

Was the possession of Mrs. Powers adverse under the laws of this Territory? She made a peaceable entry upon the premises, inclosed the same by a fence in 1872, and annually cultivated and improved the same from 1872 until 1876. If her possession during this period was adverse to that of the appellant, she ac-

quired a good title to the land which she actually occupied. The courts have held under similar statutes that adverse possession not only bars the remedy and extinguishes the right of the party having the true paper title, but vests a perfect title in the adverse holder. *Leffingwell v. Warren*, 2 Black, 599; *Meeks v. Vassault*, 3 Sawyer, 206; *Arrington v. Liscom*, 34 Cal. 365; *Cannon v. Stockmon*, 36 id. 535; *Figg v. Mayo*, 39 id. 262; *Morris v. De-Celis*, 51 id. 55; Angell on Lim. (5th ed.), ch. 31.

In *Ellicott v. Pearl*, 10 Pet. 412, STORY, J., remarks in the opinion that "the erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property." In *Livingston v. Peru I. Co.*, 9 Wend. 511, SAVAGE, C. J., says: "Where the person claiming to hold by possession has no written evidence of title, but claims by parol to be the owner, there must be an actual occupancy, a *pedis possessio*, a substantial inclosure by fence, sufficient for the protection of the crops." In *Humbert v. Trinity Church*, 24 Wend. 587, it is decided that where there is an actual occupation of land, an oral claim thereto is sufficient to sustain the defense of adverse possession. "Putting a fence, for example, around the land, or erecting buildings upon it, are constructive notice to the world." *Poignard v. Smith*, 6 Pick. 172; Angell on Lim. (5th ed.), § 383. While the statutes of the Territory, *supra*, control this matter, we have referred to these decisions to show that the legislative assembly recognized and adopted legal principles which had been established many years. We have also seen the effect of their application to facts, which are similar to those under consideration. Under the testimony, it is clear that the possession of Mrs. Powers, after the inclosure of the land by her fence, was adverse more than three years before this action was commenced.

The appellant insists that the court erred in excluding the following evidence, which was offered during the trial: That Codling bought the buildings in 1871, but did not buy the land because it was owned by the appellant; that he sold the buildings to Mrs. Powers in 1872, and then told her that he claimed no interest in the ground and could only sell these improvements;

and that he also told her that the appellant owned the land, and that the buildings had been erected by the permission of the appellant.

Does this testimony affect the character of the possession by Mrs. Powers? Does it tend to prove that she succeeded Codling as a tenant at sufferance of the appellant, if we assume that he sustained this relation? A review of the facts enables us to give to these questions satisfactory answers. We are acquainted with the rule that the declarations of a tenant in the possession of land may be given in evidence as a part of the *res gestæ* to qualify the possession; but, before the introduction of this testimony, "it must be proved that the tenant was in possession at the time the proposed declarations were made." *Ellis v. Janes*, 10 Cal. 456. Codling did not deliver the possession of the land in controversy to Mrs. Powers, and there is no testimony that he was in the possession of the same when the foregoing statements were made. When Mrs. Powers constructed and maintained her fence after she purchased the interest of Codling in the buildings, the appellant and all persons were notified that she was in the actual occupancy of the premises in dispute, and that she was asserting some right which might ripen into a perfect title, if she was not interrupted in a legal manner. Codling did not erect a fence and sold none to Mrs. Powers. The fence was maintained by Mrs. Powers without any license or action on the part of the appellant, or its agents, and the relations of all the parties by virtue of the transactions between Codling and this respondent concerning the buildings are of a different nature. The appellant stood by and saw Mrs. Powers do those acts without making any objection. We will assume that this testimony had been admitted, and that the respondents knew that the appellant had received a patent to the land from the United States. Mr. Tyler, in his work on Ejectment, says: "Neither a deed nor any equivalent muniment is necessary where the possession is indicated by actual occupation, and any other evidence of an adverse claim exists.

\* \* \* An oral claim of exclusive title, or any other circumstances by which the absolute owner of land is distinguished from the naked possessor, are equally admissible and may be equally

satisfactory. \* \* \* It has been expressly held, that neither fraud in obtaining the possession of land, nor knowledge on the part of the tenant that his claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner in not bringing his action within the prescribed period." In *Crary v. Goodman*, 22 N. Y. 170, SELDEN, J., says: "Under the Statute of Limitations the real owner has twenty years in which to learn the fact that another is in the actual possession of his land, and may justly be charged with *laches*, if within that time he fails to discover and to assert his rights." Under the laws of this Territory, the appellant had three years in which he was required to ascertain the facts relating to the possession of the premises by the respondents, and obtain a remedy for his wrongs. No legal excuse is offered in behalf of the appellant or its agents, for the *laches* or negligence appearing in this action. The testimony of Codling could not affect the legal rights of the appellant and respondents, and was properly rejected.

The appellant claims that the title of the respondents was not hostile in its inception. But the acts of Mrs. Powers, under the statutes of the Territory, *supra*, were of this character. She intended to hold the land which was inclosed by her fence, against the claim of all persons, and her possession was hostile or adverse to the rights of the true owner. Angell on Lim. (5th ed.), § 391; *Adams v. Burke*, 3 Sawyer, 415. The testimony of Mrs. Powers that she always claimed the title to the premises is uncontradicted.

Judgment affirmed.

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SHOBER, appellant, v. JACK, adm., respondent.

COMMERCIAL LAW — *declarations of indorsers not receivable against subsequent holder of note.* The decision of the supreme court of the United States in the case of *Dodge v. Freedman's Saving and Trust Co.*, 3 Otto, 379, must control the courts of this Territory, which holds that the declarations or admissions of the indorser or assignor of a note as to the payment thereof, though such note were indorsed or assigned after maturity, cannot be introduced in evidence against a subsequent owner and holder thereof.

**PRACTICE**—*exceptions*—*sufficiency*—*time*. An objection to evidence on the general ground of *incompetency* is sufficiently explicit, if such evidence would not be competent in any phase of the case. It is sufficient in point of time if the record shows the objection was made at the time of the trial.

**CONSTRUCTION OF STATUTE**—*interest does not exclude witness*—*exception to this general rule*. Section 444 of the Civ. Pr. Act of Montana, 1872, changes the common-law rule and allows any party to be a witness notwithstanding his interest in the result of an action. Section 445 of the same act limits this general rule, leaving it to stand as at the common law, where the adverse party is the representative of a deceased person, and the facts to be proven transpired during the life of such deceased person.

**EVIDENCE**—*competency of witness*. It is never presumed that a witness is incompetent. The one objecting must show why or wherein the witness is incompetent. Nothing appearing to show that a witness was incompetent, his exclusion was error.

The range of proper cross-examination must be confined to points affecting the credibility of a witness.

*Appeal from Third District, Lewis and Clarke County.*

THIS cause was tried in the court below by WADE, C. J.

SHOBER & LOWRY, for appellant.

The court below improperly admitted evidence of declarations of Hall, indorser to plaintiff. Such testimony is inadmissible against one to whom it is subsequently transferred for value, though after maturity. *Dodge v. Freedman's Savings and Trust Co.*, 3 Otto, 379; *Whitaker v. Brown*, 8 Wend. 490; *Page v. Caywin*, 7 Hill, 361; *Beach v. Wise*, 1 id. 612.

A party who can call a witness will not be permitted to prove his declarations. 1 Phillips on Ev. 186; 12 Wend. 142.

Hall was a competent witness under the Civ. Pr. Act of Montana. He had no interest in the issue of the suit.

It was proper for plaintiff to show witness' interest in defeating his recovery.

CHUMASERO & CHADWICK, for respondents.

That Hall was an incompetent witness, see *Chase v. Evoy*, adm., 51 Cal. 618; *Ketchum*, admx., v. *Hill*, 42 Ind. 78-9; *Clarke v. Smith*, exr., 46 Barb. 30; *Dyer v. Dyer*, 48 id. 190; *Satterlee v. Bliss*, 36 Cal. 512; 7 U. S. Dig. 910-11, §§ 4 and 18.

As to rule applicable to the construction of such a statute, see *Dewey v. Goodenough*, 56 Barb. 57.

If Hall, the assignor, could not be a witness under the statute, the administrator had no other means to prove the payment of the note save Hall's declarations made while Kratzer was living. 1 Wharton on Ev., §§ 226-27; 2 id., § 1163a; *Fitch v. Chapman*, 10 Conn. 11-12; *Bond v. Fitzpatrick*, 4 Gray, 89; *Sylvester v. Crapo*, 15 Pick. 92; *Harris v. Brooks*, 21 id. 195; *Gallagher v. Williamson*, 23 Cal. 331; *Bunbury v. Brett*, 18 Ind. 343; *Roe v. Jerome*, 18 Conn. 138; *Hollister v. Reznor*, 9 Ohio St. 1.

The authorities to support the proposition that such declarations are competent and admissible to prove payment are innumerable and nearly unbroken. See in addition, 1 Greenleaf on Ev., § 190.

The question asked of witness Knight was irrelevant and not proper cross-examination.

KNOWLES, J. This is an action on a promissory note. The defendant pleads payment. The plaintiff is the indorsee of the note after maturity. S. M. Hall was the payee of the same. In support of his plea of payment, defendant introduced in evidence the declarations of said Hall at the time he was the owner and holder of said note, to the effect that the said note had been paid, and that the deceased Kratzer owed him nothing thereon.

The statement in the case specifies that this evidence was duly objected to as incompetent.

The plaintiff in rebuttal offered in evidence the said Hall. The defendant objected to his testifying in the case for the reason that the said Kratzer, the maker and payer of said note, was dead, and the case was being defended by his administrator. The court sustained the objection and plaintiff excepted to the ruling.

The points presented in the case are as follows: 1. Did the court err in admitting the declarations of Hall? 2. Did the plaintiff properly except to the ruling, admitting such declarations? 3. Did the court err in sustaining the objection to Hall's testifying in the case?

The first point is decided in the case of *Dodge v. Freedman's Savings and Trust Co.*, 3 Otto's U. S. Sup. Ct. R. 379. In

this case it is held that the declarations or admissions of the indorser or assignor of a note, although indorsed or assigned after due, as to the payment thereof, cannot be introduced in evidence against a subsequent owner and holder thereof in an action thereon. That most learned court seemed to consider this a well-established doctrine, when there cannot be much doubt but that the current of decisions, both in England and the United States, is adverse to this view, and two such leading writers upon evidence as Greenleaf and Wharton favor a different rule. This court, however, is bound by the above decision, and although with great reluctance, must follow it. We must hold then that the court committed an error in admitting these declarations.

The respondent urges that the specification of the objection to the evidence was too general. The ground of objection was that the evidence was incompetent. If there was no phase of the case which would permit the introduction of such evidence, then the objection was specific enough. It would be difficult to see how an objecting party could be more specific under the circumstances, unless he should set forth the reasons for holding such evidence incompetent, and this he should not be required to do. There was no status of this case in which the evidence was competent therein under the decision, *supra*.

It is claimed, however, that the record does not show that the exception was taken at the proper time. It shows that it was taken at the trial. An appellate court in such matters should not be hypercritical. If the error complained of is clearly pointed out, and the fair presumption from the record is that the exception was taken in due time, then I think it ought to be considered. The language of the exception, after setting forth the evidence of the declarations of Hall, is as follows: "The declarations of Hall, one of the assignors of the note, were objected to as incompetent by plaintiff. The court overruled the objection, and plaintiff excepted." I hold that a fair inference from this is, that the exception was taken at the time the declarations were given in evidence, and not afterward. Certainly, the objection to this evidence was not raised for the first time in this court. I hold that enough appears in the record to show that this exception was taken at the proper time.

The objection to Hall's testifying in this case was based upon the ground that Kratzer, the maker of the note, being dead, and the suit thereon being defended by the administrator, Jack, and Hall being the payee named therein, he was not a competent witness. Whether or not this view was correct, depends upon the construction given to sections 444-5 of our Code of Civil Practice for 1871-2.

The first clause of section 444 provides: "No person shall be disqualified as a witness in any action or proceeding on account of his opinions on matters of religious belief, or by reason of his interest in the event of the action or proceeding as a party thereto or otherwise." Hall was not a party to this action. Was he interested otherwise than as a party thereto? Who is interested in the event of a suit or proceeding other than as a party thereto? We must turn to the common-law rule to determine who such persons were under it, that we may correctly interpret the language here used. At common law parties to an action were incompetent witnesses on account of their interest in the event of the suit (1 Greenl. on Ev., § 347), and when the event of the suit would render a person legally liable to a party to the action, then he was not a competent witness. 1 Greenl. on Ev., § 393. Section 444 of our Civil Code was intended to abrogate generally the above rules of the common law and to allow parties and those interested in the event of a suit by being made legally liable to one of the parties thereto, should the action be decided against him, to be introduced in evidence. Section 445, *supra*, made an exception to this new rule when the adverse party, for whose immediate benefit the action or proceeding is prosecuted, is the representative of a deceased person, and when the facts to be proven transpired before the death of such person, and in such cases left the rule to stand just as it was at the common law before the enactment of said section 444. The evidence sought to be introduced by Hall was as to facts which transpired before the death of Kratzer. He was an incompetent witness then as to such facts if he had any direct legal interest in the event of this action. As the indorser or assignor of said note he would not have any legal interest in the event of this action unless he was

liable on his indorsement. To make him liable on that he must have been duly notified within a reasonable time of the presentment of this note to Kratzer or his representative for payment, and the non-payment of the same. This is the rule although the note was indorsed to the plaintiff after maturity. 1 Pars. on Cont. (6th ed.) 256; 2 Pars. on Bills and Notes, 13.

There is nothing in the record to show that Hall had been notified of the presentation and non-payment of said note in such a way as to render him liable on his indorsement. We cannot presume that such notice was given to Hall. When a party objects to a witness as incompetent he should show wherein he is not competent. It is never presumed that a witness is incompetent.

If Hall had due notice of presentment of note and non-payment of the same, or if such notice was waived, or if Hall is the real party in interest in this action, or would be made in any way legally liable, should Shober lose this action, the defendant ought to make it appear, when he (Hall) would be classed as an incompetent witness, as being interested in the event of the suit although not a party to it. As none of these things appear in the record I hold that the court committed an error in excluding the said Hall from the witness stand in this case.

The court properly sustained the objection to the question asked witness Knight: "Have you and Kleinschmidt purchased from said S. M. Hall, one of the assignors of the demand sued upon, subsequent to Kratzer's death, a large demand against his estate?" It did not appear that Kratzer's estate was insolvent, or that it would in any way affect the interest of Knight in that estate, should the plaintiff recover in this action. Unless this was the case how would Knight's credibility be affected by an answer to such a question? The evidence was incompetent unless it was directed to the point affecting his credibility, and this could not be affected in this way, unless it was shown that he would lose if plaintiff recovered in this action.

For the errors heretofore specified the judgment in this cause is reversed, and the order overruling plaintiff's motion for a new trial is set aside, and the cause is remanded for a new trial.

*Judgment reversed.*

## LARGEY, respondent, v. SEDMAN, appellant.

**PRACTICE** — *correction of statement on appeal.* After a statement on appeal has been settled by the judge who tried the cause, this court will not correct the same by receiving the affidavits of parties claiming that the testimony of witnesses has not been reported correctly.

**CASE AFFIRMED.** The case of *Hale v. Park Ditch Co.*, 2 Mon. 498, holding that the twenty-sixth rule of this court is not applicable when the judge settles the statement on appeal according to his recollection of the evidence, affirmed.

*Appeal from First District, Madison County.*

SANDERS & CULLEN, and J. E. CALLAWAY, in support of the petition.

E. W. & J. K. TOOLE, and S. WORD, *contra.*

WADE, C. J. This is a petition to correct the statement on appeal, contained in the transcript in the case filed in this court, under the provisions of rule 26. The petition, which points out wherein the statement, as settled by the judge, differs from the recollection of the petitioner as to the evidence, is sworn to by the appellant. The petition is also supported by the affidavit of Thompson, one of the defendants in the court below and a witness upon the trial, in which the affiant attempts to show wherein the statement differs from, or is in conflict with, his recollection of the testimony.

This application comes directly within the decision of this court in *Hale v. Park Ditch Co.*, 2 Mon. 498, in which we hold that "the judge is to say what the witnesses testified to upon the trial, and not the witnesses themselves. \* \* \* Neither is it proper for a party to procure affidavits from witnesses as to what they testified to, and present them to the court to influence his settlement of the statement. The statement must be settled by the judge from what transpired in court, and his memory upon the subject is absolute." It is further held that, where there is a conflict between the parties as to the evidence and what the statement should contain, the judge must settle such conflict, and in doing this, he must depend upon his own memory as to what the testimony was. Under the twenty-sixth rule "it must be shown to

this court that the judge refuses to certify to the statement as he remembers it."

This petition contains no such averment, and is wholly insufficient to bring this application within the rule and decision of this court, and is therefore dismissed.

*Petition dismissed.*

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GONU, appellant, v. RUSSELL, respondent.

LOCATION OF QUARTZ LODS -- *forfeiture — resumption of work*: The Russell lode was located prior to May 10, 1872, and the record title was in A. a number of years before July 21, 1877. A. performed work eighteen days on the property, between December 7, 1875, and December 17, 1875, and did no more work thereon until July 19, 1877. B. relocated this lode July 3, 1877, under the name of the Empire lode by posting his notice of location on a stake at the discovery shaft of the Russell lode. A. entered upon the lode July 19, 1877, and worked about one hour, when B. run the lines of the Empire lode, and cut and placed thereon four corner stakes. The notice of B.'s location was recorded July 20, 1877. *Held*, that the act of B. in placing the notice on said stake did not constitute a location of the lode, under the laws of the United States. *Held, also*, that A. had the right to resume work on the Russell lode at said time and thereby defeat a forfeiture of his title. *Held, further*, that the acts of B., after the resumption of work by A., did not impair A.'s rights to the Russell lode.

*Appeal from Third District, Lewis and Clarke County.*

THE action was tried before WADE, C. J.

CHUMASERO & CHADWICK, for appellant.

Respondent was required to perform work or make improvements on the Russell lode, annually. Upon his failure so to do, the lode was open to relocation in the same manner as if no location had ever been made, provided work was not resumed after failure and before a relocation. U. S. Rev. Sts., § 2324. No work was done by respondent after December, 1875, until after the location by appellant July 3, 1877. The lode was subject to relocation, when appellant posted his notice of relocation and took possession. At this time, work had not been resumed by respondent, and his right to the possession and to resume work thereon had terminated.

Where several acts are required to be done to perfect a location under the laws of the United States, they need not be done simultaneously. The doing of any one necessary act confers the right to go on and perform the other requirements within the time recognized by law, and the last act done relates back to the first and should be considered as done on that day. Discovery, taking possession, notice, record and staking are all necessary to a valid location, but it is not material which is first done, if all are done within the time required by law.

The relocation of an abandoned claim is to be treated as if the prospector had located a new discovery. *Murley v. Ennis*, 2 Col. 300.

Under the laws of the Territory, the locator has twenty days within which to perfect his location. Sts. 1876, 127. This is a reasonable time.

Respondent could not resume work after his failure to represent the lode, and appellant in good faith took possession thereof and endeavored to comply with the law within the time allowed for such compliance. Under any other construction, a party once locating a claim could do no work thereon and fail to comply with the law, until a new locator commenced proceedings of relocation, and then resume work and defeat the policy of the law, which is the development and sale of the mineral lands of the United States.

E. W. & J. K. TOOLE, for respondent.

Appellant's notice does not form one of the acts required in making a location or relocation, under the laws of congress or this Territory. No local regulation is shown which gives it validity. The notice did not confer on appellant constructive possession.

Under the act of congress, the locator of a lode must perform three acts: 1. Discover a vein. 2. Locate the claim. 3. Record the same. U. S. Rev. Sts., §§ 2322, 2324.

Forfeitures are odious in law, and never occur by implication. Respondent had the right to enter the lode at any time before a relocation was completed by appellant. The notice was a fraud.

It designated stakes not put up, and described a piece of ground existing only in imagination. The notice and stakes must correspond with the record. A party cannot post his notice of location and afterward place his stakes regardless of the notice. The staking should be done before the notice is posted. Appellant's notice is without any sanction in law or custom. No act necessary to a location was done by appellant before the posting of the notice. *Murley v. Ennis*, 2 Col. 305; *Week's Min. Lands*, 122; *Golden F. Co. v. Cable C. Co.*, 12 Nev. 320; *Hess v. Winder*, 30 Cal. 349; *Copp's Decis.* 225, 321-325.

Appellant claims he should have had a reasonable time to put his stakes where they were called for. There is no positive law upon this subject. Appellant should have staked the lode with reasonable diligence, and only a few hours were necessary to do the work.

BLAKE, J. The complaint alleges that the appellant was the owner and possessor of the Empire Quartz lode, September 17, 1877, and that the respondent entered thereon September 17, 1877, and withholds the possession from the appellant. The prayer is for the recovery of the possession and damages for the unlawful detention. The answer denies the allegation of ownership and possession and contains a cross-complaint, which avers that the respondent before the location of the Empire lode was the owner and possessor of the J. H. Russell lode; that he recommenced work upon this property July 17, 1877; and that the appellant has entered on the premises and is removing the quartz therefrom. The answer prays for a decree of title to the premises in the respondent, and an injunction restraining the appellant from working thereon. The replication of the appellant alleges that the J. H. Russell lode is embraced within the boundaries of the Empire lode, and that the appellant entered into the possession of the same July 3, 1877.

There does not appear to be any controversy respecting the facts. The appellant complains of errors in law which occurred in the instructions given by the court to the jury. The J. H. Russell lode was located by the respondent and other parties

prior to May 10, 1872. By location and purchase, the respondent became the owner thereof, and the record title thereto was in his name a number of years before July 21, 1877. The respondent performed work thereon eighteen days between December 7, 1875, and December 17, 1875, and did no other work afterward until July 19, 1877. The appellant relocated July 3, 1877, the J. H. Russell lode under the name of the Empire lode by posting a notice on a stake at the discovery shaft of the J. H. Russell lode. The notice was regular in its description of the boundaries and the stakes at the corners of the Empire lode, and was recorded July 20, 1877, in the proper office. The respondent entered upon the premises and commenced to work July 19, 1877, and about one hour afterward, the appellant run the lines of the Empire lode and cut and placed thereon stakes at its four corners.

The appellant maintains that the respondent failed to perform the labor and make the improvements required by the laws of the United States, and that the property in controversy was subject to relocation July 3, 1877; that several acts are necessary to complete the location of the quartz lode; that the performance of one act by the appellant conferred the right to do the other acts within twenty days; and that the respondent had no right to resume work on the J. H. Russell lode after the appellant had taken possession July 3, 1877.

The statutes of the United States, which are applicable to these questions, provide that "the location must be distinctly marked on the ground so that its boundaries can be readily traced," and that, upon a failure to perform labor, or make improvements, which are specified, "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location." The miners of the mining district in which the lode in dispute is situated, did not make regulations "governing the location, manner of recording, amount of work necessary to hold possession" of the same. U. S. Rev. Sts., § 2324.

The legislative assembly of the Territory requires the discoverer of a mining claim to make a record thereof in the office of the county recorder of the county in which the same is situated, within twenty days after its discovery. Sts. 9th Sess. 127, § 1.

There must be a substantial compliance with these statutes. The appellant did not mark on the ground his location of the Empire lode, before the resumption of work by the respondent, and its boundaries could not be traced readily, or otherwise. The law of congress, *supra*, which governs this matter, is the embodiment of one of the most ancient customs that has prevailed among miners. The supreme court of the United States in *United States v. Castillero*, 2 Black, 17, one of the most important cases ever heard by this tribunal, reviews the ordinances of Spain and Mexico prescribing the mode of acquiring title to mines, and holds that a strict compliance with their terms and conditions is essential. In a learned opinion, Mr. Justice CLIFFORD says: "Boundaries also must be fixed to carry the adjudication into effect, or rather to complete it, else the title or claim, like other indefinite and uncertain interests in lands, will be void for uncertainty. Marking of boundaries also is essential under all circumstances, whether the mine is situated in public or private lands, compliance with the requirement is essential to show what extent of the public domain has been segregated from the mass of such lands and has passed into private ownership. \* \* \* Public convenience, therefore, in such a case requires that the boundaries should be fixed, and, besides, unless the limits of the pertenencia were fixed and staked, or monuments set, other tribunals, whose duty it is to adjudicate lands to applicants for agricultural purposes, would be subjected to embarrassment and be led into error." This decision was rendered in 1862 and formed the basis of some of the sections relating to mineral lands which were afterward enacted by congress. The necessity of the marking of boundaries has been recognized in the courts of the mining States. *Hess v. Winder*, 30 Cal. 349; *Golden F. Co. v. Cable C. Co.*, 12 Nev. 312. In the last case the court observes: "There is no way of locating a quartz vein except by marking out surface-lines."

The respondent failed to comply with the statutes, *supra*, and did not perform the work on the J. H. Russell lode, which is therein required, but he had the right to defeat the forfeiture of his interest in the property by resuming labor thereon before a location thereof had been made by another. Did the act of the appellant in placing the notice on the stake at the discovery shaft constitute a location according to law? This is the sole question for our determination. The notice did not designate the boundaries, because it defined them by monuments which were not upon the ground. The appellant did not mark his location of the Empire lode on the ground until the respondent resumed work thereon. The law contemplates that the location of a mining claim shall consist of a number of distinct acts, which are independent of each other. The last that may be done does not relate back to the first, and all must be performed before a legal location exists. The owner of the lode which has become subject to relocation can resume work thereon at any time prior to the performance of all these acts. The appellant could not make a valid location of the Empire lode until he had marked the boundaries so that they could be traced readily by means of stakes, monuments, natural objects or any other certain means. The resumption of labor in good faith by the respondent, before the appellant perfected his location, rendered null the prior acts of the appellant.

The instructions of the court state the foregoing propositions and are correct.

*Judgment affirmed.*

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NOTE.—The reports of the following cases were published after this judgment had been entered. In *Holland v. M. A. G. Q. M. Co.*, 53 Cal. 149, the plaintiffs relocated a quartz mining claim by posting notices upon two trees, one at each end thereof. After the defendant resumed work on the lode, the plaintiffs had the ground surveyed and the boundary lines duly marked. The court held that the plaintiffs had not complied with the provisions of the act of congress, section 2324, *supra*, requiring the marking of the location on the ground. In *Gelcich v. Moriarty* 53 Cal. 217, the plaintiffs placed a monument of stones three or four feet high upon the croppings of the lode and posted a notice of their location thereon. The defendants posted their notice upon a similar monument. The court held that both parties failed to mark their locations according to said section. In *Gleeson v. Martin W. M. Co.*, 13 Nev. 442, the locators of a lode posted their notice upon the croppings at the discovery point, and placed two stakes, one at the north-west and the other at the south-east end. The stakes were marked properly and were nearly on a line with the croppings of the vein. The court held that the locators complied with said section and that the boundaries could be "readily traced."—B.

## TERRITORY EX REL. TANNER, appellant, v. POTTS, respondent.

MANDAMUS—*not a civil action—proper parties.* A proceeding in mandamus is not a civil action under our Code of Procedure, with individual parties plaintiff and defendant. The action should be brought in the name of the Territory at the relation of the party beneficially interested. *Case of Chumaseo v. Potts*, 2 Mon. 242, considered.

STATUTE OF LIMITATIONS—*due diligence.* Though the Statute of Limitations only applies in express terms to civil actions, and the issuance of a writ of mandate rests in the discretion of the court, yet courts in exercising that discretion will be guided by the bearing of that statute, upon analogous civil actions, as is done in equity cases.

An applicant for this writ should exercise due diligence. After the delay shown in this case the court below properly refused the application.

CONSTRUCTION OF STATUTE. Section 448 of our Criminal Practice Act, makes it the duty of the governor, not as executive of the Territory, to audit the expenses of the messenger duly appointed to return a fugitive from justice. These expenses would properly include a reasonable compensation for time as well as actual and necessary outlays of money in the service, and should not necessarily depend upon the return of the fugitive. What such reasonable compensation would be is left by the statute to the discretion of the governor, but an application to compel the governor to audit such a claim, if made in due time, should be entertained.

*Appeal from Third District, Lewis and Clarke County.*

THIS cause was tried in the court below by WADE, C. J., on demurrer to the so-called complaint and was appealed from the judgment sustaining the demurrer.

E. W. TOOLE, for appellant.

The duty sought to be enforced in this action is a purely ministerial one enjoined by act of legislature, and not one belonging in any way to the office of governor. 2 Mon. 256 ; 51 Cal. 328-338.

The petition or affidavit shows that the plaintiff is beneficially interested ; the relief sought is against a public officer charged with performance of a duty enjoined by law ; and that he has no other plain, speedy and adequate remedy at law.

There is no controversy as to the amount to which plaintiff is

entitled, if entitled at all, so that there is no question involving the discretionary powers of defendant. The demurrer admits all. The plaintiff has a legal claim and the law gives no other remedy. 7 Cush. 226; *Moses on Man.* 54, 55, 79, 86.

This is not of the class of actions affected by the Statute of Limitations. 15 Minn. 221; 2 Mon. 258.

The statute relied on only took effect August 1, 1878, it cannot apply to the case at bar. 17 Wall. 596; 10 Cal. 305; *Angell on Lim.* 261.

Sections 447-8 of our Criminal Practice Act do not warrant the interpretation that the messenger shall receive nothing in case he does not return the fugitive. It is the duty of the governor to know that the fugitive is in custody before issuing his warrant, and when the messenger has performed his duty in obedience thereto he is entitled to compensation.

SANDERS & CULLEN, for respondent.

Mandamus only issues to an inferior tribunal or person and would not properly apply to control the acts of the governor. See *High on Ex. Leg. Rem.*, § 120 *et seq.*

This action is an attempt to interfere with the discretionary power of the governor, which all authorities agree cannot be done. *High on Ex. Leg. Rem.*, § 120; *Moses on Man.* 80; *McDougall v. Bell*, 4 Cal. 178; *Marbury v. Madison*, 1 Cranch, 169.

Section 448 of Criminal Practice Act vests the governor with the authority to pass upon the justice and legality of the messenger's claim, and places it beyond the reach of mandamus.

Neither under the United States nor Territorial statutes is an officer entitled to pay unless he brings the prisoner with him. His only remedy is an appeal to the legislature.

This action is an attempt indirectly to get judgment against the people of the Territory on an unliquidated demand of extortionate dimension. It is an unwarranted use of the process. *High on Ex. Leg. Rem.*, §§ 101-2.

The supreme court could not try the issues of fact that would arise in the case. The law has established another tribunal for

questions of this kind. *United States v. Guthrie*, 17 How. 284.

According to the decisions of the United States courts, this proceeding would be an action to which the Statute of Limitations applies. *Kendall v. United States*, 12 Peters, 524; *Kendall v. Stokes*, 3 How. 100; *Commonwealth v. Dennison*, 24 How. 97.

The Statute of Limitations is properly applicable in any event. Ang. on Lim. 20; *Miller v. M'Intyre*, 6 Peters, 61; *Elmendorf v. Taylor*, 10 Wheat. 152; Story on Part., § 233 a.

For New York court authorities on this case see *People v. Colburn*, 20 How. Pr. 378; also, *People v. Lewis*, 28 id. 159.

KNOWLES, J. This is an application for a writ of mandate, at the instance of the above-named appellant, Tanner, commanding the above-named respondent, Potts, as governor of Montana Territory, to audit and allow a claim of said Tanner for expenses incurred and for compensation for services, while acting as messenger under the appointment of the said Potts, and required by the warrant issued by him as governor of Montana Territory, to proceed to the State of Ohio and there receive and convey to Montana one Gus. Callahan, who was a fugitive from justice therefrom, and who had been duly indicted for an offense against the laws thereof, in the county of Gallatin in said Territory.

I think it my duty to remark that the proceedings in this case have been treated throughout as though it was a civil action, legal in its nature. The applicant for the writ is treated and named as the *plaintiff* in what is termed a complaint and the said Potts is called the *defendant*, and this so-called complaint is demurred to by the so-called defendant. The practice in this respect was so fully considered and determined in the case of *Chumaseo v. Potts*, 2 Mon. 242, that I think it surprising that the courts of the Territory should be confronted with such proceedings. The writ of mandate, under our statute, issues upon an application, which is nothing more than a motion, and this supported by an affidavit of the applicant or some one in his behalf. When the writ issues, it is in the name of the Territory,

on the relation of the beneficiary, and if the writ is in the alternative, the person who is commanded by the writ must show cause why the writ should not be made peremptory, by an answer thereto. If the affidavit which should not be entitled is insufficient, this may be attacked on motion to quash the writ. In mandamus proceedings there can be no such case as *Tanner v. Potts*. The proceedings should be entitled: "The Territory of Montana at the relation of *Tanner v. Potts*." This court is called upon to treat this complaint as an affidavit to support an application for a writ of mandate, and the demurrer thereto as a motion to quash the writ. It is to be hoped that the profession will more carefully observe the well-established rules of practice in this proceeding hereafter.

The first point I shall consider is: Were the proceedings herein barred by the Statute of Limitations? The proceeding to procure a writ of mandate, according to the decision of this court in the case of *Chumasero v. Potts*, cited above, is not what is denominated a civil action under our Code. The Statute of Limitations then does not in express terms apply to the same. That applies to civil actions. The issuance of the writ of mandate, however, rests in the legal discretion of the court, to whom application is made therefor. In exercising this discretion the court may consider the bearing of the Statute of Limitations upon analogous civil actions and determine therefrom whether the application has been made in due form. In equity cases, to which the Statute of Limitations in some States do not apply, this rule is observed, and it seems to me to be a good one in proceedings in mandamus. In the case of *The People v. Supervisors of Westchester*, 12 Barb. (N. Y. S. C. R.) 446, it was held that that court would entertain an application for a writ of mandamus, up to the time the Statute of Limitations would run in an analogous case in an action at law, leaving the impression that they would not consider such an application after that time. Certain it is, the authorities sustain this view. The applicant should not be guilty of an unreasonable delay in making his application. 1 Redfield on the law of Railways. 658; *Moses on Man.* 190; *The People on the relation of Beach v. Seneca Chancery Pleas*, 2

Wend. 265 ; *The People on the relation of Phelps v. Delaware Com. Pleas*, id. 257.

It appears from the affidavit, or complaint as it is called, that the applicant made out his account and presented it to Potts for him to audit in 1873. This action was commenced in October, 1877. Under the 47th section of the laws of Montana, all actions not specially provided for in said statute upon limitations should be commenced within three years. This would include all actions against officers for the neglect or omission to perform their official duties, save sheriff, coroner and constable. Actions against the latter for such causes, section 43 of said laws provides, must be commenced within two years. The applicant in this case has allowed his right to proceed for the writ of mandamus to rest for about three years at least, perhaps longer, as the complaint is not definite upon this point. Taking the rule in legal actions as a guide, I am satisfied the applicant herein did not proceed in time, and the court below in exercising its judicial discretion properly refused the writ. When courts are called upon to exercise a judicial discretion in allowing claims, they never favor those which are stale.

As to the other points presented in this proceeding, I am of the opinion that a person who is appointed and acts as a messenger to proceed under the warrant of the governor to arrest and return to this Territory a fugitive from justice, although he may not succeed in arresting or returning such fugitive to his proper custodian, is entitled to a reasonable compensation therefor, and that the term *expenses*, as used in section 448 of our Criminal Practice Act, should not be confined to what were the actual and necessary expenses of such messenger, but embrace what would be a just compensation for such services. The statute, however, leaves it to the governor to determine what is a just compensation for the performance of such services. From the averments in the affidavit of the applicant, it would seem that he entertained the notion that the province of the governor in such cases is to ascertain the amount to his satisfaction, of the charges made and expenses incurred by him. This is not the province of the governor under this statute in such cases. He is to ascertain and

be satisfied that the charges made by such messenger are just and reasonable, and when so satisfied, he should audit the same. I am further of the opinion that the governor in such matters acts as an auditing officer and not in an executive capacity, as the executive of the Territory, and that an application for a writ of mandate to compel him to proceed and audit a claim for such services and determine to his satisfaction how much would be just and reasonable, if made in due time, should be entertained. This court, however, could not, upon any statement of facts under the said section 448, dictate to the governor what would be a just and reasonable compensation for such services. The determination of this rests in his discretion.

For the reason that the application was not made within a reasonable time, it is ordered that the judgment of the court below be affirmed with costs.

*Judgment affirmed.*

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SHAFFER, respondent, v. CONSTANS, appellant.

PLACER MINES — *possession of adverse claimant.* A. possessed ten years a lot of land in Oro Fino gulch and had an arastra thereon. B. located in 1877 a placer mining claim in the gulch which included A.'s property, and filed his application in the land office to obtain a patent thereto from the United States. A. filed in the office an adverse claim to said lot. The gulch was returned by the official surveyors as mineral land, and it had been mined to one point about one thousand feet above, and another point about two thousand feet below the arastra. There was no testimony showing that the intermediate three thousand feet of the gulch contained any metals, and it did not appear that the channel passed through A.'s lot. *Held*, that A. is an adverse claimant under the acts of congress relating to placer mining claims, and that B. is not entitled to the patent to the land in A.'s possession.

*Appeal from Third District, Lewis and Clarke County.*

THE action was tried by WADE, C. J.

E. W. & J. K. TOOLE, for appellant.

The only claim the respondent could have to the premises in controversy is by virtue of his claim to a mill-site, and this kind

of a right cannot be asserted or maintained upon mineral land. U. S. Rev. Sts., § 2337.

The land was returned as mineral land, and respondent, claiming the same under the law concerning mill-sites, must prove its non-mineral character. Copp's Decisions, 129 ; Week's Mining Decisions, 255, 329-331.

The occupancy of the land for an entirely different character from that of mining by respondent cannot furnish ground for relief against the claim of appellant, who made his application to enter and survey before respondent asserted his claim by any marks or monuments designating the exterior boundaries thereof.

CHUMASERO & CHADWICK, for respondent.

BLAKE, J. The respondent brings this action to determine his right to the possession of a certain tract of the public domain of the United States. The issues were tried by the court without a jury, and the following facts appear in the findings.

The respondent had enjoyed the possession of the land for the period of ten years before the commencement of this action, and had and used an arastra thereon. Oro Fino gulch was discovered and portions thereof were mined for the precious metals before the occupancy of the respondent. It was impossible to decide whether the channel of this gulch was within or outside of the land in dispute, although the arastra appeared to be in the bed of the gulch. The appellants located a part of the gulch, including the premises of the respondent, several years after the occupation thereof by the respondent, but before the mill-site had been designated by any marks or monuments. The gulch was returned to the United States land office as mineral land, and has been mined to one point one thousand feet above, and also to another point two thousand feet below the arastra. The intermediate space of three thousand feet has not been mined or worked on account of the obstacles in finding the bedrock. There was no other testimony tending to show that the tract in controversy contained any minerals.

The court rendered judgment that the respondent was entitled, as against the appellants, to the possession of the mill-site.

It appears from the pleadings that the appellants filed their

application in the United States land office in Helena, in this Territory, to enter a parcel of placer mineral land in said gulch. The respondent filed his adverse claim to the part, which has been mentioned and then commenced this action.

The appellant contends that the only right of the respondent to the premises is under his claim to a mill-site, which cannot be maintained on mineral land ; and that therefore the respondent must prove that the same is non-mineral. We must determine, in the first place, whether the respondent can be treated as an adverse claimant according to the statutes of the United States respecting placer mining claims.

In the 420 *M. Co. v. Bullion M. Co.*, 3 Saw. 634, Mr. Justice SAWYER says: "The party who at the time can maintain his right to the claim in the courts of the country as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom congress intended to confer the right to purchase, no matter how that right originated, if, under such laws and customs and decisions of the courts, he has the present right. And this is simply a right to purchase — a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy." In *Chapman v. Toy Long*, 4 Saw. 28, it is held that the locator of a mining claim "need not take any steps to purchase the land or obtain a patent for it."

The assistant attorney-general of the United States in his opinion in *Becker v. Central City*, a subject of controversy arising in Colorado, says: "Possession is one of the elements of title, and is made by this statute a necessary subject of inquiry. If found to be in any one other than the claimant, it is a bar to the issuance of a patent, at least until adjudged wrongful in the manner pointed out in the sixth section. \* \* \* In the present case the application for a patent includes the surface and soil, as well as the mineral. I am of the opinion that the persons in possession of this surface are adverse claimants, and have an adverse claim within the meaning of this law, and are entitled to be heard in the local courts before patent is issued." Weeks on *Mineral Lands*, § 148.

Under the laws of the United States the proprietor of a lode may obtain a patent to non-mineral land, which is used for mining or milling purposes; and the owner of a quartz mill or reduction-works, who does not possess a mine in connection therewith, "may also receive a patent for his mill-site" in the same manner as said proprietor. U. S. Rev. Sts., § 2337. The adverse claimant is required to show "the nature, boundaries, and extent of such adverse claim," and "commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession." U. S. Rev. Sts., § 2326.

The respondent is not seeking to obtain a patent to his mill-site from the United States, and cannot be compelled to be a purchaser thereof. He has stated the "nature" of his adverse claim, and we are satisfied that he had the "right of possession" to the lands in controversy upon the trial in the court below. In this inquiry, the character of the premises does not affect the rights of the respondent, and he was not called upon to prove that they were non-mineral.

The appellants do not allege in their answer that they have complied with the mining rules, customs and regulations of the mining district in which Oro Fino gulch is situated. They are not entitled to receive a patent to the tract, which has been claimed by them, if this fact is not established. It has been adjudged correctly that the respondent has the right to occupy the land on which his arastra is situated, as against any title which has been asserted by the appellants.

*Judgment affirmed.*

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CLARK, administrator, respondent, v. NICHOLS ET AL., appellants.

**FORECLOSURE OF MORTGAGE**—*reasonable attorney fee*—*frivolous appeal—damages*. In an action in chancery to foreclose a mortgage, which provided, in case of default in payment, for recovery of reasonable attorney's fees, and the complaint demanded for such fees ten per cent on the amount of the claim secured, and the answer neither denied the contract nor the reasonableness of the demand, and the court submitted to the jury for a special finding simply

how much was due on the note secured by the mortgage, without objection of defendants or request for submitting any other issue, and the court, after receiving and approving the finding of the jury, heard evidence on the matter of attorney fees, to which defendants objected, and rendered its decree for the amount due on the note and ten per cent thereon for attorney fees. *Held*, that it was in the discretion of the judge sitting as chancellor to submit special findings to the jury, and that it was not error to hear proof as to the reasonable value of attorney's services after the findings of the jury had been returned into court, to render judgment thereon and include the same in the final decree.

Such action of the court furnished no ground for exception. An appeal based thereon must be regarded as frivolous and for delay only, and as properly calling for the imposition of damages as provided by statute. Civ. Pr. Act, 1872, § 378.

*Appeal from Second District, Deer Lodge County.*

E. W. TOOLE and SANDERS & CULLEN, for appellants.

The court erred in hearing testimony on the matter of attorney fees, after having approved the finding of the jury as to the amount due on the note secured by the mortgage.

The special issue submitted to the jury should have included all questions of fact raised; failure to do this was a virtual withdrawal of the same. *Gonzales v. Leon*, 31 Cal. 98; 23 id. 282.

These questions may be reviewed without motion for new trial. *Allen v. Hill*, 16 Cal. 113.

Facts must be found expressly, not impliedly. *Breeze v. Doyle*, 19 Cal. 101.

There was no sufficient finding upon the issue of defendant's unsoundness of mind.

W. W. DIXON, for respondent.

The answer did not deny the allegation as to attorney fees and so raised no issue to submit to a jury. Appellant did not ask a finding from the jury on such an issue.

In chancery cases the court exercises its discretion as to what issues shall go to a jury and may adopt or reject its findings.

This case is governed by the Practice Act contained in the Codified Statutes 1872, having been commenced in May, 1877.

Appellants asked no other findings to be submitted to the jury, and did not except to any want of finding on any point. They are not in condition to prosecute an appeal. See Cod. Stats. 71, § 220. The issues submitted were as broad as the pleadings.

The record shows that the appeal is frivolous and respondent moves that the judgment of the court below be affirmed with just damages as provided by statute and the rules of this court. Cod. Stats. 108, § 378; Rule 23 of this court.

WADE, C. J. This is a suit in chancery to foreclose a mortgage. Special issues were submitted to a jury, who returned the same into court, and, among other things, found the amount due to the plaintiff from the defendant Nichols upon the note secured by the mortgage. In addition to the amount of the note, the complaint demanded a certain sum alleged to be due the plaintiff from the defendant upon a certain contract contained in the mortgage, whereby it was stipulated and agreed between the parties, that in case default be made in the payment of the note, or any part thereof, or interest thereon, and the mortgage foreclosed, the defendant Nichols, mortgagor, would pay to Scott, mortgagee, as expenses of foreclosure, a reasonable attorney's fee, and that the mortgage was intended to secure the payment of the same. The averments of the complaint were admitted by the answer. After the return of the special findings by the jury, proof was introduced before the judge to show the reasonable value of the attorney's fees for foreclosing the mortgage, to the introduction of which the defendant objected, and filed his bill of exceptions, the only exception in the case. After hearing this proof, and approving and adopting the findings of the jury upon the special issues, the court rendered a decree in favor of the plaintiff for the amount due upon the note and the amount due as attorney's fees, by virtue of the agreement contained in the mortgage. There were no objections to the issues submitted to the jury, and no demand for the submission of any other or different issues, and no objections to the findings of the court or to the decree, and the sole question

that can be legitimately discussed or decided herein is : Did the court err in receiving proof of the reasonable value of the attorney's fees for foreclosing the mortgage, after the special findings of the jury had been returned into court ?

This is a suit in chancery, tried before the judge sitting as a chancellor, from whom emanates the decree, and who is entirely responsible therefor. In such a suit the chancellor may send any one or more, or all the issues to a jury in aid of his conscience, or he may dispense with a jury altogether, and try all the issues himself. In either case, the chancellor is alone responsible for the decree ; for if special issues are sent to a jury, he must either approve or reject them, and if he reject, make other findings upon the proof. These principles are elementary, and I doubt if they were ever seriously questioned.

It follows, therefore, that it was entirely legitimate in this case for the judge to send certain issues to a jury, and to hear proof upon others himself, and after approving or rejecting the findings of the jury, and making others of his own, upon the whole case, the pleadings, the evidence and the findings, to render a decree in accordance therewith.

Besides all this, the contract for attorney's fees upon foreclosure, and that the reasonable value thereof was ten per cent upon the amount found due upon the note, is admitted by the defendant in his answer. It would, therefore, have been folly to have submitted to the jury a special issue upon that question. But the court in rendering a decree must take into account not only the facts established by the evidence, but all matters admitted in the pleadings. And because the chancellor took the precaution, in order further to satisfy himself as to the value of the attorney's fees, to hear proof as to such value, notwithstanding defendant's admission, was no error.

There can be no real controversy over the question raised by the one single exception contained in the record, and there was no good reason for appealing this case to this court. The appellant's purpose evidently was to delay the execution of the judgment against him, and in such cases it becomes our duty, under the statute, not only to tax the costs to the appellant, but to add

thereto a judgment against him for such damages as may be just. The judgment is, therefore, affirmed, and it is ordered that the costs of the appeal be taxed to the appellant, and that the respondent recover against him a judgment equal to five per cent upon the amount of the judgment in the district court.

*Judgment affirmed, with penalty.*

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CHUMASERO, appellant, v. VIAL, respondent.

**PRACTICE**—*judgment affirmed if findings are not inconsistent with it.* This action was tried by the court without a jury, and an appeal was taken from the judgment. There was no motion for a new trial, and the appellant did not request any findings upon the issues, nor move to correct the findings by the court. A judgment was entered in conformity with the findings. *Held*, that this court cannot examine any question of fact in the case, and that the judgment must be affirmed, because the findings are not inconsistent with the judgment.

**JUDICIAL SALES**—*title of a purchaser.* C. was the purchaser at a sale of mineral land by the sheriff under an execution against V. The court found that V. was holding the legal title in trust for T. at the time of the sale, but that V. had no interest when this action was commenced. *Held*, that the rule of *caveat emptor* applies to sales under execution, and that C. had no title to the property.

*Appeal from Third District, Lewis and Clarke County.*

THIS action was tried by WADE, C. J., without a jury.

CHUMASERO & CHADWICK and W. F. SANDERS, *pro se*, for appellants.

The appellants were *bona fide* purchasers without notice of any outstanding equities between Turner and Vial. The secret trust between these persons cannot affect appellants, who in law and equity are entitled to protection against it. Perry on Trusts, § 218; *Prevo v. Walters*, 4 Scam. 35; *Moore v. Hunter*, 1 Gilm 317; *Martin v. Dryden*, id. 187.

A purchaser in good faith is one who has advanced the consideration of the purchase, or a creditor, who applies the pur

chase-money in payment of his debt, or one who buys at an execution sale to satisfy a debt. A creditor, who satisfies an execution to the extent of his bid, is a *bona fide* purchaser. *Jackson v. Town*, 4 Cow. 605; *Ray v. Birdseye*, 5 Denio, 625; *Herman on Execution*, §§ 328, 338; *Hunter v. Watson*, 12 Cal. 363; *Wood v. Chapin*, 13 N. Y. 509; *Ayers v. Duprey*, 27 Tex. 593; *Evans v. McGlasson*, 18 Iowa, 150; *Miller v. Finley*, 26 Mich. 249; *Wood v. Moorehouse*, 1 Lans. 412.

The title of a purchaser at an execution sale relates back to the date of the judgment. Such a purchaser is treated as if he had bought at the same date from defendant in the execution. *McClure v. Englehardt*, 17 Ill. 47; *Reichert v. McClure*, 23 id. 516; *Robinson v. Rowan*, 2 Scam. 501.

A purchaser at a sale under a judgment is protected from claims of third persons, of which he had no notice, the same as a purchaser at a private or voluntary sale. *Leeds v. Marine I. Co.*, 2 Wheat. 380; *Gilner v. Poindexter*, 10 How. 257; *Goepp v. Gartiser*, 35 Penn. St. 130; *Paine v. Moorland*, 15 Ohio, 435; *Butterfield v. Walsh*, 36 Iowa, 534.

Purchasers at execution sales are to the same extent as other purchasers entitled to the benefit of statutes requiring instruments affecting the title to real estate to be recorded. *Waldo v. Russell*, 5 Mo. 387; *Scribner v. Lockwood*, 9 Ohio, 184; *Stewart v. Freeman*, 22 Penn. St. 120.

Where one claims under an unrecorded deed, he must prove actual notice, to entitle him to recover. *Curtis v. Mundy*, 3 Metc. 406; *Lawrence v. Stratton*, 6 Cush. 163; *Sibley v. Leffingwell*, 8 Allen, 584.

Our statute provides that conveyances, or agreements to convey real estate, to operate as notice, shall be recorded. Cod. Sts. 400, §§ 23, 25.

E. W. & J. K. TOOLE, for respondent.

There was no motion for a new trial, and the facts cannot be reviewed on this appeal.

Under our statute, the purchaser acquires no greater title than the judgment debtor had at the time of the levy and purchase.

If the judgment debtor had no beneficial interest in the property that would pass by the sale, the statute defines his remedy and rights. Cod. Sts. 87, § 279; 89, § 286; Harston's Pr., § 708 and notes; *Cross v. Zane*, 47 Cal. 603. In the absence of the statute the rule is the same.

BLAKE, J. The appellants bring this action in the nature of ejectment to recover the possession of certain mineral land. The complaint alleges that the title of the appellants is based upon their purchase of the property at a sale thereof by the sheriff of Jefferson county, Montana Territory, by virtue of an execution issued in favor of C. K. Peck and against J. A. Vial. No question arises respecting the validity of the judgment obtained by Peck against Vial, and the proceedings under the execution. Vial and D. C. Turner, two of the respondents, stated in their answers that Turner owned the property at the time when the officer levied upon and sold it.

The case has been brought before this court by an appeal from the judgment of the court below. No motion for a new trial has been made. A jury was waived at the trial and the findings of the facts and conclusions of law appear in the transcript. The court found that Turner was the legal owner of a part of the land and the equitable owner of a part thereof, the legal title to which was in Vial; that Turner furnished the money and purchased the same through Vial, who held a part thereof, at the time of the sale under said execution, in trust for Turner; that, at the commencement of this action, Vial had no interest in the property; and that Turner was entitled to the proceeds and possession of the same. A judgment was entered in conformity with these findings.

The appellants maintain that they are *bona fide* purchasers of the property without notice of any equities or trust between Vial and Turner, and that unrecorded deeds from Vial to Turner, of which the appellants had no notice, could not affect their title. Can the appellants be heard upon these propositions? This action was commenced June 19, 1877, and must be governed by the Civil Practice Act, approved January 12, 1872. The appel-

lants did not request a finding in writing upon any issue of fact at the trial, nor move to correct the findings. The questions for our consideration are determined without difficulty. The argument of the appellants is based upon the assumption of certain facts, which have not been found by the court, and maintains that the findings are against the evidence, and that the evidence is insufficient to justify the same. This court cannot review the testimony and make proper findings. *Barkley v. Tieleke*, 2 Mon. 435. Questions of fact cannot be examined if there is no appeal from an order granting or refusing a motion for a new trial. *Allport v. Kelley*, 2 Mon. 343.

This appeal has been taken from the judgment alone, and the only questions before us relate to the conclusions of law which must be drawn from the facts. *Gates v. Salmon*, 46 Cal. 361. On an appeal from the judgment-roll, the judgment will not be reversed if the findings do not support it. The judgment will be allowed to stand unless there is an absolute inconsistency between the express findings and the judgment. *Mathews v. Kinsell*, 41 Cal. 512; *Thompson v. O'Neil*, id. 683. The application of these principles is decisive of the case at bar. The findings are not inconsistent with the judgment.

If we assume that the main legal question, which has been discussed by counsel, is properly before us, we are unable to find any error in the judgment. The Civil Practice Act declares, in relation to sales by the sheriff under an execution, that "upon a sale of real property the purchaser shall be substituted to and acquire all the right, title and interest and claim of the judgment debtor therein." § 279.

If Vial had no interest in the property in controversy at the date of the levy of the execution in favor of Peck, the sheriff could not sell and convey any estate to the appellants. The rule of *caveat emptor* applies to execution sales, and the officer "is not bound to convey with a warranty, neither does the law imply one." Rorer on Jud. Sales, 29, and cases there cited. The rights of Turner were not prejudiced by the proceedings under the execution against Vial.

*Judgment affirmed.*

## MING, appellant, v. WOOLFOLK, respondent.

CONSTRUCTION OF CONTRACT — *statements of signer—resources of water ditch.*

A. signed and delivered to B. and C., September 16, 1874, an instrument, by which he agreed to pay two promissory notes made by A. B. and C. to D., as soon as he collected for the Park Ditch Company a certain promissory note, a claim and "other demands due it," or received "from any sources whatever of the Park Ditch Company" "any other sums." A. claimed that he had not collected or received any sums on account of the Park Ditch Company, and B. and C. paid two-thirds of the amount due upon the notes to D., and brought this action to recover what had been so paid. Upon the trial the instrument was read in evidence, and B. and C. offered to prove that A. in 1875, received \$3,000 from the sale of the water of the Park Ditch Company, and that A. said to B. and C., when he delivered the instrument, that "from any resources whatever" included receipts from the sale of said water. The court excluded the testimony, and B. and C. were nonsuited. *Held*, that, according to the terms of the instrument, the sale of the water in 1875 was included in the resources of the Park Ditch Company, and that the evidence should have been admitted. *Held, also*, that the recitals of the instrument may be referred to for the purpose of ascertaining the situation of the parties thereto.

*Appeal from Third District, Lewis and Clarke County.*

THE action was tried before WADE, C. J., with a jury.

SANDERS & CULLEN and CHUMASERO & CHADWICK, for appellants.

The recitals in the contract on which this action is brought are non-contractual and do not control the contractual part. It is signed by respondent alone, and he cannot derive any benefit from his statements in the immaterial recitals. 1 Greenl. Ev., §§ 26, 285-287; 2 Pars. on Cont. (4th ed.) 13-19, 66, 67; 2 Whart. Ev., §§ 937-940, 1039, 1040, 1085.

The evidence offered by appellants was competent. Respondent was estopped from denying that the Park Ditch Company had pledged the water receipts of 1875, and was responsible to the appellants for such receipts in like manner, as if they had been pledged for the payment of the money procured and paid by appellants. Chit. on Cont. \*84; Bigelow on Estop. 475-480, 496-500, 515, 516, 554-560; 2 Whart Ev., §§ 1086, 1087, 1146-1155.

The representations of respondent should have been admitted. They had a direct bearing on the contract referring to the resources of the Park Ditch Company, and bound and estopped the respondent. *Kerr on Fraud*, 69-78; *Stow v. Wyse*, 7 Conn. 214; *Bushnell v. Church*, 15 id. 406; *Continental Bank v. National Bank of Commonwealth*, 50 N. Y. 575.

E. W. TOOLE, J. H. SHOBER and M. BULLARD, for respondent.

The recitals of the contract sued upon, and the agreement with Hale, which is referred to and is in evidence, should be considered in construing the instrument sued on. *Rogers v. Smith*, 47 N. Y. 324; *Meriden B. Co. v. Zingsen*, 48 id. 247. They show the motives of appellants in paying the note to Hale.

Respondent could not pay over receipts from the sale of water of the Park Ditch Company without defrauding the creditors of the company, and there is no consideration to support such an undertaking. It would also be in conflict with the consideration set up in the instrument, the pledge of the Park Ditch Company. *Archibald v. Thomas*, 3 Cow. 284.

Instruments must be construed by their spirit, and an absurd or repugnant clause, even if it will admit of no legal construction, must be rejected as surplusage. *Pars. on Cont.*, title "Construction of Contracts;" *Harston's Pr.*, § 1859; *Code Civ. Proc.*, § 598.

Appellants sought to prove a different inducement for borrowing the money of Hale than that set forth in the instrument sued on. The recitals are a substantial part of this instrument and cannot be varied by parol. *Renard v. Sampson*, 2 Kern. 561; *Schermerhorn v. Vanderheyden*, 1 Johns. 139; *Maigley v. Harrer*, 7 id. 341; *Halliday v. Hart*, 30 N. Y. 474.

Appellants claim that respondent pledged what was not in existence, the receipts of 1875. This is an enlargement of the instrument and in conflict with its terms. "Any other demands due it," could not include the receipts of 1875, which came into existence in the middle of the succeeding year. 2 *Whart. Ev.*, §§ 921, 922; *Osborn v. Hendrickson*, 7 Cal. 282.

Appellants attempted to introduce parol evidence to enlarge,

vary, alter or contradict the instrument sued on, and thereby override a well-settled rule of evidence. *Taylor v. Holter*, 1 Mon. 688; 1 Greenl. Ev., §§ 275-282; 2 Pars. on Cont. 60, 61.

Appellants could not have any claim to the receipts of 1875, unless they were really pledged, and the misrepresentations of respondent gave them no right to water, which belonged to the Park Ditch Company, or its creditors. The instrument sued on shows what was pledged by the Park Ditch Company, and appellants cannot be allowed to aver that they were deceived by false representations of respondent. 2 Whart. Ev., § 932.

BLAKE, J. The rights of the parties to this action are determined by the construction and interpretation of the following contract, which was executed by Woolfolk, the respondent, and delivered to Ming and Kinna, the appellants:

“HELENA, Sept. 16, 1874.

Whereas, John Kinna and John H. Ming have this day joined with me in borrowing the sum of (\$2,572.10) twenty-five hundred and seventy-two and ten one-hundredths dollars for the purpose of paying R. S. Hale the balance of eight thousand dollars due him under private agreement with said Ming, Kinna and Woolfolk in order for their release from certain notes executed by them to said Hale as security for the Park Ditch Company;

And whereas, the Park Ditch Company has pledged the note of William Chessman to it, and its claim against Felix Posnain-sky and any other demands due it to the extent of repaying to the said Ming, Kinna and Woolfolk the sum of \$2,572.10 this day borrowed;

Now, therefore, the said Woolfolk does hereby agree that if he shall collect any of the above-named amounts, or shall from any resources whatever of the Park Ditch Company, receive any other sums, after deducting all costs, charges and expenses, to apply the same in payment of said note, and also another note executed to R. S. Hale for taxes, amounting to between six and seven hundred dollars, until said notes shall be fully paid; said payments to be made by the said Woolfolk after his return from

the east next spring, and as soon thereafter as the amounts shall be received, but the said Woolfolk does not assume to pay said note only to the extent that he shall receive such amounts from the resources of the Park Ditch Company as aforesaid.

A. M. WOOLFOLK."

Said Ming and Kinna brought this action to recover from said Woolfolk the sums that are mentioned in the contract and were paid by them to said Hale. The complaint alleges that the appellants were induced solely by the statements of the respondent at and prior to the receipt of the contract, to borrow from said Hale the said sum of \$2,572.10, and execute said note for the same; that the respondent then stated that the Park Ditch Company had passed a resolution in conformity to the recitals of the contract, and pledged said Chessman note, said claim against Posnainsky and all its resources, including receipts from water sold and to be sold, to the repayment to the appellants and respondent of said sum of \$2,572.10; that these statements were false, but that the respondent is estopped from denying and proving that the company had not passed this resolution; that the appellants paid to said Hale two-thirds of said sum of \$2,572.10, and two-thirds of said note for taxes; and that the respondent received from the resources of the Park Ditch Company a sum sufficient to pay the appellants, but has refused to pay them any amount. The answer of the respondent denies that he made these statements, and avers that he did not collect any of the demands which are described in the contract.

At the trial, the court below refused to allow the appellants to offer testimony tending to prove that the respondent stated, at and before the execution of the contract, that the trustees of the Park Ditch Company had passed a resolution appropriating the receipts from the sale of water during the season of 1875; that the appellants would not have executed said note to said Hale and accepted said contract, if the respondent had not made these statements; that the respondent received in 1875, \$3,500 from the sale of water from the Park ditch and appropriated the same to his own use; and that the respondent stated to the appellants,

before the contract was delivered, that the clause therein, "from any resources whatever," included the receipts from the sale of water for 1875, and that there would be two months of the best of the water season of 1875, before the time for redemption would expire, and that the Park Ditch Company would be entitled to the proceeds.

The court sustained the motion of the respondent for a nonsuit, and we must review the above ruling.

It will be observed that the respondent alone signed the contract and agreed to perform certain acts. "Where the language of an instrument has a settled legal meaning, its construction is not open to evidence." 2 Pars. on Cont. (5th ed.) 551. If there is any doubt as to the interpretation of this contract, that construction must be adopted which will be more to the advantage of the appellants, upon the general ground that "a party who takes an agreement prepared by another, and upon its faith incurs obligations or parts with his property, should have a construction given to the instrument favorable to him." *Noonan v. Bradley*, 9 Wall. 407; *Barney v. Newcomb*, 9 Cush. 46. In *Brawley v. United States*, 96 U. S. 173, Mr. Justice BRADLEY says: "Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

Guided by these principles, let us confine our attention to one inquiry: Can the appellants compel the respondent to pay to them, on account of the indebtedness assumed by them under the contract, any part of the proceeds which he received from the sale of water from the Park ditch in 1875? The respondent contends that his liability is limited by the terms of the agreement to the payment, if collected by him, of the Chessman note, the Posnainsky claim, and any other demands which were due to the Park Ditch Company at the date of the execution of the contract, September 16, 1874, and that the future earnings of the corporation are not affected by the instrument. The contract consists of certain recitals that may be referred to for the pur-

pose of ascertaining the situation of the parties, but the legal obligation of the respondent is determined by the last paragraph. It appears that the appellants and respondent borrowed of R. S. Hale the sum of \$2,572.10, and that the Park Ditch Company had pledged the Chessman note, the Posnainsky claim and the other demands due it, to repay said amount to the appellants and respondent. The respondent agrees to apply in payment of said sum of \$2,572.10, and a note for taxes amounting to \$600 or \$700 executed to said Hale, any of the "above-named amounts," and "any other sums" which he may receive "from any resources whatever of the Park Ditch Company." The corporation did not secure the payment of the note for taxes by the pledge of its property. It appears that the demands due to the company were appropriated to the payment of some of its liabilities, and that these demands and its resources were to be used in discharging the same and other indebtedness by the respondent. The respondent further agreed to pay these sums after his return from the east, and as soon as he received the same. It is admitted in the pleadings that the respondent returned from the east about May 1, 1875.

We must, if possible, give effect to the whole instrument. No word is to be treated as a redundancy, if any meaning, that is reasonable and consistent with the other parts, can be given to it. The "demands due," which are mentioned in the contract, in the commercial and popular acceptance of the words, are debts presently payable. *Leggett v. Bank of Sing Sing*, 25 Barb. 326. If the position of the respondent is sound, the clauses of the agreement concerning the resources of the Park Ditch Company are meaningless. The instrument provides for the performance of acts by the respondent at times which were uncertain, because they were dependent on contingencies. What were the resources of the Park Ditch Company, exclusive of the "demands due it" September 16, 1874? There could not be any thing, except the property of the corporation, and it is not claimed that the respondent has received any sum from the sale of any part thereof. The testimony shows that Hale, in September, 1874, had a decree for the sale of this property, and that the company was insolvent,

and that its sole resources at that time were the right of redeeming this property from Hale, and the enjoyment of the income during the period allowed by law for its redemption.

When the situation of the parties is considered, we think that the language of the contract can be understood. The respondent agreed to apply on the indebtedness which has been described the amounts which he collected from the demands due to the Park Ditch Company, September 16, 1874, and "any other sums" which might become payable to it from any persons after September 16, 1874. The following definitions of the term "resources," are given by Webster: "Money or any property that can be converted into supplies; means of raising money or supplies; capabilities of producing wealth or to supply necessary wants; available means or capability of any kind." The liability of the respondent is not measured by the meaning of this word alone, but we are of the opinion that this author sustains our construction of the contract to the extent of its effect upon it. We admit that some of the definitions of "resources" support the views of the respondent, but this concession makes applicable the following rules, which are fatal to his case. If the terms of the contract be vague and general, or have divers meanings, parol evidence is admissible of any extrinsic circumstances tending to show what things were intended by the respondent or to ascertain his meaning in other respects. 1 Greenl. Ev., § 288.

In *Gray v. Harper*, 1 Story, 574, where two booksellers contracted for the sale and purchase of a work at "cost," parol evidence of conversations between them, at the time of making the contract, was admitted to show what sense they attached to that term. 1 Greenl. Ev. (12th ed.), §§ 280 and 295 and notes; *Sargent v. Adams*, 3 Gray, 72; *Brawley v. United States*, *supra*.

We think that the court below erred in excluding testimony tending to prove the sums which were received by the respondent in 1875 from the sale of water from the Park ditch, and the disposition thereof, and also the conversations between the appellants and respondent respecting the "resources" of the Park Ditch Company.

It is therefore ordered that the judgment of the court below be reversed, and that this case be remanded for a new trial.

*Judgment reversed.*

KNOWLES, J., concurred.

WADE, C. J., dissenting. I cannot agree to the construction put upon the contract by the majority of the court.

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BOARDMAN, respondent, v. THOMPSON ET AL., appellants.

**FORCIBLE ENTRY AND DETAINER**—*title cannot be shown.* In an action brought under the statutes of Montana for forcible entry and unlawful detainer (Codified Statutes, 1872, chap. 3, p. 163), the defendant cannot be permitted to show title in himself, or to disprove the title of plaintiff. This action was not designed to supersede that of ejectment. The decisions under the differently worded statute of California are inapplicable in Montana.

**LAWFUL ENTRY.** An entry by law is only given after an adjudication by a court, and judgment awarding possession.

**POSSESSION BY CONSENT.** The law requires one whole year's quiet possession by defendant to bar plaintiff's action under the statute, and consent will not be presumed from the plaintiff's silence for any shorter period.

**PRACTICE.** Where the transcript fails to give the full evidence adduced on the trial, this court will presume that plaintiff's possession was satisfactorily proved to support the judgment rendered in the court below, though the evidence included in the transcript presented is insufficient for the purpose.

**EVIDENCE.** Evidence of staking a claim in this action is competent to show the extent of plaintiff's possession, on the same grounds as a deed would have been to show boundaries.

*Appeal from Second District, Deer Lodge County.*

THIS action, to recover the possession of a quartz mining claim, was tried in the court below by KNOWLES, J.

A. E. MAYHEW, and SHARP & NAPTON, for appellants.

The plaintiff did not prove possession in himself in such way as to entitle him to maintain this action. Staking a claim in the name of a company must be accompanied with evidence showing that the party so doing was agent or lessee. *Overman S. M. Co. v. Am. Mining Co.*, 7 Nev. 312.

If entry is made in temporary absence of plaintiff he should attempt to re-enter or bring action as soon as he has knowledge of the fact. Silence gives consent to the possession. By the instruction given by the court below this form of action is placed on the same footing as ejectment.

Defendants should have been permitted to prove title.

Peaceable entry by law is given when the party owns the property upon which he enters, even though another temporarily absent claims possession.

Section 636, in connection with sections 643 and 652 of the Code of Civil Practice, 1872, show that a defendant may prove title in himself to justify his entry and make it a peaceable re-occupation of his own property. 38 Cal. 410; 41 id. 242; 45 id. 495, 597, 677.

W. W. DIXON, and SANDERS & CULLEN, for respondents.

The statement of evidence being stricken out all presumptions of law are in favor of sustaining the verdict and judgment.

It is wholly immaterial for whom the plaintiff stakes the ground in dispute. The evidence was competent to prove the extent of possession.

Questions of title or right of possession cannot arise in this form of action. *McCauley v. Weller*, 12 Cal. 524; *Mitchell v. Davis*, 23 id. 381.

The Montana statute differs essentially from the California act of Forceful Entry.

The evidence offered by defendants was inadmissible under the pleadings, even if the California statute was law in Montana.

It was not a question of civil right, but of public mischief. 2 Wharton's Cr. Law, 2044.

WADE, C. J. This is an action under the Forceful Entry and Detainer Act, instituted by the plaintiff to recover the possession of a portion of the Original Quartz lode, situate in the Summit Valley Mining District, Deer Lodge county.

Our statute, giving this action and defining its nature and extent, is in effect but declaratory of the common law, as modified

by early parliamentary enactments and is as follows: "Sec. 636. No person or persons shall hereafter make any entry into lands, tenements, or other possessions, or by entering upon any gulch mining claim, or any quartz mining lode claim, or other mining claim in the temporary absence of the party or parties in possession, or by entering peaceably and the turning out by force or frightening by threats, or other circumstances of terror, the party or parties out of possession, and detain and hold the same. In every such case, the person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act; but not in cases where entry is given by law, and in such cases not with strong hand, nor with multitude of people, but only in a peaceable manner; and if any person from henceforth do the contrary, and thereof be duly convicted, he shall be punished by fine." Sec. 643. "On the trial the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of the forcible entry, or was entitled to the possession of the premises at the time of the unlawful holding over. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of one whole year together next before the said inquisition, and that his interest therein is not yet ended or determined; and such showing shall be a bar to the prosecution; and in no case where the title to land is involved, shall a justice of the peace have cognizance."

This statute was designed to protect the *possession* of real property. It provides a summary remedy when such possession is invaded, either by a forcible entry, or by a peaceable entry in the temporary absence of the person in possession or by unlawful detainer. It restricts the issue at the trial to an inquiry into the actual and peaceable *possession* of the complainant, and the forcible entry or unlawful detainer of the defendant. It makes a whole year's peaceable, actual possession by the defendant a bar to the action, but it permits no inquiry either by complainant or defendant as to the *right* of possession. It inquires after the fact of peaceable, actual possession, but does not trouble itself as

to the *right*. That inquiry belongs to another form of action and to another tribunal. At common law a forcible entry or an unlawful detainer of real property was a public offense (4 Blackstone's Com. 148) and punished accordingly, but it was always an offense against the peaceable possession of the person in such possession, in which the question of the right of possession was not involved and could not be tried, the purpose of the trial being to punish the violence by which the forcible entry or the unlawful detainer was accomplished, and to restore the *possession* to the person from whom it had been violently taken or detained. And our summary civil remedy based upon and growing out of this public offense at common law preserves this distinguishing characteristic, and forbids an inquiry into the title or right of possession of the person who by force and violence has been deprived of his peaceable possession, and is content to restore such possession to the person who has been violently deprived thereof, the great purpose of the action being to place the parties in the position they occupied before any force or violence had been used. When restored to this position, and not before, are they in a situation to institute a suitable action before a proper tribunal to try the question of title and right of possession. The obvious aim of the statute is to prevent any man from asserting his title or right by violence. Its purpose is to defeat the occupation and possession of property by force, and to cause every man to submit to the law instead of being a law unto himself.

1. After these general observations as to the meaning and purpose of the statute in question, we come now to inquire: Did the court err in excluding the evidence of defendant's title to the mining ground described in the complaint? In other words, is title an issue in an action of forcible entry and detainer? This question might be satisfactorily answered by ascertaining what it is necessary for the plaintiff to establish in order to maintain the action. And for this purpose it is only necessary to again look at section 643 of the act, where it is declared that the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to

the possession at the time of the unlawful holding over. The defendant may controvert this possession of the plaintiff, and show possession in himself for the period of one whole year next before the inquisition, and this is the extent of his defense. It follows, therefore, that if the plaintiff establishes the fact that he was peaceably in the actual possession of the premises, and that the defendant at the time forcibly entered and took possession, he maintains his action, no matter if the defendant at the time of his entry was the owner of the title and entitled to the possession, and as to such title and right of possession they are wholly immaterial matters, forming no defense to the action, and cannot be inquired into. Our statute is not peculiar in narrowing the issues and in limiting the defenses in this summary proceeding. In this regard we have followed the common law, as have the statutes of most of the States. Said Lord KENYON: "If the landlord had entered with a strong hand to dispossess the tenant with force (after the expiration of his term), he might have been indicted for a forcible entry." *Taunton v. Costar*, 7 Term R. 431. Said Sir WILLIAM RUSSELL: "There is no doubt that in England a party is indictable for forcible entry into premises in which he has the legal title." 2 Whart. Crim. Law, 2038.

At common law no allegation beyond possession was necessary, and of course mere possession was sufficient to support the prosecution. 2 Whart. Crim. Law, 2042. A party peaceably in the actual possession of lands at the time of a forcible entry, or in the constructive possession thereof at the time of a forcible holding over, is entitled to proceed under the statute of forcible entry and detainer, though he is neither seized of a freehold nor possessed of a term of years in the premises. 4 Black. Com. 148.

The defendant can neither go into evidence to disprove the title of the plaintiff nor to establish his own. The question of title cannot be raised; the possession only of the plaintiff must appear; and the party in peaceable possession cannot be legally ejected by force, though not entitled to such possession; but the question of right does not arise, and the defendant cannot set up his right as a defense to his forcible entry or unlawful detainer.

2 Whart. Crim. Law, § 2044; *Bliss v. Range*, 6 Conn. 78; *Black v. State*, 3 Yerg. (Tenn.) 588; *Shandy v. School Directors*, 32 Ill. 290; *Smith v. Hoag*, 45 id. 250; *Hunt v. Wilson*, 14 B. Monr. (Ky.) 44; *Spalding v. Mayhall*, 27 Mo. 377; *Gibson v. Tong*, 29 id. 133; *Settle v. Henson*, 1 Morris (Iowa), 111; *Clark v. Stringfellow*, 4 Ala. 358; *Mitchell v. Davis*, 23 Cal. 381; *Dutton v. Tracy*, 4 Conn. 79; *Fortier v. Ballance*, 18 Ill. 539.

It is claimed, however, that the California Forceful Entry and Detainer Act, and the decisions thereunder, have made an innovation upon the general rules as established by this long and unbroken line of decisions, and that the same are applicable to our statute. This claim requires examination.

Section 3 of the California Act of 1866 is as follows: "If any person shall in the night time, or during the absence of the occupant of any lands or tenements, unlawfully enter upon such lands or tenements," etc., such person shall be deemed guilty of forcible entry, etc. In the case of *Conroy v. Duane*, 45 Cal. 601, arising under this act, the court held, not indeed that the defendant may make a defense by proving title and the right of possession in himself, as if these things were issues in the case, but that title and the right of possession may be proved in the defendant to show his good faith in making the entry, and that the same was not unlawful. Also, in the case of *Powell v. Lane*, 45 Cal. 678, the court say that an entry is not *unlawful* within the meaning of the third section of the act (quoted above), which was made peaceably and in good faith; referring to *Shelby v. Houston*, 38 Cal. 410. And in *Townsend v. Little*, 45 id. 676, it was held, that if the defendant entered upon the land in good faith, believing she had a legal right to enter, the action of forcible entry and detainer could not be maintained against her.

But I apprehend that even under the California statute, the circumstances in mitigation or in excuse of the entry should be properly pleaded in order to be proved, and if these decisions were applicable to the case in hand, under our statute, the failure of the answer to make these averments would preclude their proof. But our statute wisely, it seems to me, does not submit the question of the propriety of making a forcible entry to the

judgment of the defendant. It does not permit the forcible *act* in the first instance, and the trial of the *right* thereafter. It holds out no such inducement or invitation to any one to take forcible possession in the presence of the party in possession, or in his temporary absence to peaceably take possession and thereafter to hold it by force, and after a scene of personal violence and conflict, to try the question of the right of possession, not even though such person was clothed with the title and the right of possession. Our statute makes an entry under such circumstances unlawful, and brings the party making it within the prohibitions of the Forcible Entry and Detainer Act.

The party entitled to the possession cannot take or hold such possession, and thereafter, in action of forcible entry, have his right to such possession adjudicated. But the proceedings under the statute were designed to undo the act of the party in taking or retaining forcible possession under a claim of right, and to place the parties in their former position, so that in a proper action their rights might be adjudicated. The Forcible Entry and Detainer Act was not designed to supersede the action of ejectment.

2. Our statute makes an entry lawful where it is given by law, and it is claimed by appellant by virtue of the California decisions before cited, that an entry is given by law where the party owns the property upon which he peaceably enters, even though another temporarily absent claims the possession. We do not understand that an entry is given by law until there has been an adjudication of the right, and a judgment awarding the possession. If land is bid off on a judgment, and the time of redemption has expired, a writ of assistance would issue to put the purchaser in possession. In such a case an entry would be given by law. But where the rights of the parties are undetermined, and the right of possession is claimed by both, if one of them, in the temporary absence of the other, takes peaceable possession, it cannot be said that his entry is given by law. Our statute pointedly declares that in such a case<sup>1</sup> the person making the entry shall be deemed guilty of a forcible entry, and treated accordingly.

3. The next assignment of error is predicated upon the following instruction given to the jury by the court: "If the jury believe, from the evidence, that the plaintiff consented to the possession taken by defendants, even though the possession was taken in the temporary absence of the plaintiff, they should find for the defendants. In determining whether or not the plaintiff consented to such possession, the jury may take into consideration the actions of the parties and their declarations. Mere silence, unless protracted for one year, would not warrant the jury in finding consent."

Our statute provides (§ 643) that quiet possession by the defendant for one whole year shall bar the prosecution.

If it requires a whole year's quiet possession by the defendant to bar the plaintiff's action, so, for the same reason, it ought to require a whole year's silence by the plaintiff before his consent to the defendant's possession can be presumed. The quiet possession of the defendant should ripen into a defense under the statute at the instant that the plaintiff by his silence forfeits his right of action. Until that period the plaintiff may maintain his action, for the reason that the defendant can interpose no bar to the prosecution. If under the statute quiet possession for 364 days by the defendant is no defense, then the plaintiff's silence for that period ought not to bar his action. The plaintiff's silence then gives no advantages, and confers no rights upon the defendant unless the same is continued for one whole year. It follows, therefore, that if the defendant makes a forcible entry, or a peaceable entry in the temporary absence of the plaintiff in possession, the plaintiff has one whole year in which to institute his action to recover the possession, unless he sooner gives his consent to the defendant's possession, and such consent cannot be presumed by his silence until one year has elapsed.

If after such an entry by the defendant, the plaintiff may fail for one day or one month to prosecute his action to recover possession, he may so fail for any length of time short of the period when the defendant's quiet possession defeats his action, for as long as the possession of the defendant does not ripen into a right, so long the silence of the plaintiff creates no bar.

4. The body of the testimony was stricken from the transcript, and only one item thereof is preserved in the record, viz.: that mentioned in the bill of exceptions, number one, and in substance is as follows: That the plaintiff, on or about the 28th day of January, 1878, staked the ground described in the complaint, by placing at each corner thereof a stake marked, N. M. & E. Co., meaning thereby the National Mining and Exploring Company. This testimony alone would not be sufficient to show the plaintiff's possession, but as only a small portion of the evidence in the case is before us, we must presume that such possession is satisfactorily established by showing that although the plaintiff marked the stake N. M. & E. Co., he in fact located the ground for himself, or that he was the lessee or grantee of the company, and if there was such proof, the item of evidence contained in the bill of exceptions, number one, was competent to show the extent of plaintiff's possession. A deed giving the boundaries of the property would have been admitted for the same purpose. *Brooks v. Bruyn*, 18 Ill. 539; *Mitchell v. Davis*, 23 Cal. 381.

The testimony being competent for one purpose, it was properly admitted.

It is, therefore, ordered that the judgment be affirmed with costs.

*Judgment affirmed.*

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HALE, respondent, v. FORBIS, appellant.

**SURETY ON PROMISSORY NOTE** — *release by extending time of payment — reduction of interest.* A. and B. made a promissory note September 1, 1873, and promised to pay C. a certain sum nine months after date, with interest at the rate of two per centum per month. A. paid the interest until November 1, 1874, when he signed the following memorandum on the note: "In consideration of further time being granted, I agree to pay one and one-half per cent interest per month on the within note until paid." A. was adjudged a bankrupt in 1875. Upon the trial B. offered to prove that he was a surety upon the note, and that A. and C. entered into an agreement, without his knowledge, to extend the time for the payment of the note until the spring of 1875, and reduced the rate of interest to one and one-half per cent per month. The

court excluded the testimony, and entered judgment against B. *Held*, that there was no consideration for the extension of the time of the payment of the note by C., and that B.'s evidence did not establish a defense to the action.

*Appeal from Third District, Lewis and Clarke County.*

THE action was tried before WADE, C. J., with a jury.

WOOLFOLK & BULLARD and E. W. & J. K. TOOLE, for appellant.

A valid contract between the principal and payee of a note extending the time of payment for any period, without the consent of the surety, will release him. The payee must keep in a condition to proceed on the note according to its terms. If he ties up his hands without the consent of the surety he releases him. 1 Story's Eq. Jur., § 326; Edw. on Bills, \*355, 572, 573; 2 Am. L. C. 308, 309; *King v. Baldwin*, 2 Johns. Ch. \*560; *Bangs v. Strong*, 7 Hill, 250.

It is not necessary that the security appear on the face of the note as such, if payee knew he was so in fact. Edw. on Bills, \*573; *Suydam v. Westfall*, 2 Denio, 205; *LaFarge v. Herter*, 3 id. 157; *Chester v. Bank of Kingston*, 16 N. Y. 336; *M'Gee v. Prouty*, 9 Metc. 547.

Bywaters did not promise to pay the same or a less rate of interest than he was already under a legal obligation to pay, and the cases cited by respondent are inapplicable. Respondent and Bywaters agreed to cancel the obligation of the note to pay interest at the rate of two per centum per month, before Bywaters agreed to pay interest at the rate of one and one-half per cent per month. Bywaters did not promise to pay what he was under legal obligation to pay, because this rate would have been ten per cent per annum. Bywaters made for forbearance by respondent a new promise to pay eight per cent per annum more than he was compelled to pay, and this was a good consideration for the extension of the time. The old note in this case was not in force when Bywaters made the new agreement. The authorities say, that in cases of novation, when the new obligation is substituted for the old one, which is canceled, a good consideration for

forbearance is created. Bouv. L. D., "Novation;" *Tudor v. McLean*, 1 B. Monr. 322; *Ellis v. McCormick*, 1 Hilt. 313; *Bangs v. Strong*, 7 Hill, 250; 10 Paige, 11; *People v. Russell*, 4 Wend. 570. Appellant was released by novation.

Respondent extended the time and reduced the interest, and Bywaters agreed to keep the money until the spring of 1875, and pay interest at one and one-half per cent per month. This was an agreement to do something Bywaters was under no legal obligation to do. The agreement to keep the money for a specified time beyond the maturity of the note, at any rate of interest, furnished a valuable consideration for forbearance, and released the surety. 2 Am. L. C. (3d ed.) 308.

Respondent has sued on the new promise.

The agreement on the back of the note is not a voluntary reduction of interest by respondent. It is signed by Bywaters and is his promise. Appellant never assented to this agreement of Bywaters.

The note sued on was joint. Upon the death of Forbis, his estate was discharged in law and equity. *Bradley v. Burwell*, 3 Denio, 61; *United States v. Price*, 9 How. (U. S.) 92; *Getty v. Binsse*, 49 N. Y. 385; *Wood v. Fisk*, 63 id. 245.

Our statute making all contracts joint and several was not designed to prevent parties from making joint contracts, or alter their expressed intentions. If the statute is so construed as to make for these parties a contract they did not intend, and create a liability beyond the terms of the contract itself, it would impair the obligation of contracts and be unconstitutional and void. Story on Const., § 1385 *et seq.*

CHUMASERO & CHADWICK, for respondent.

The agreement on the back of the note is the one that must be considered by this court. The note bore interest at the rate of two per cent per month after maturity. The agreement of Bywaters is *nudum pactum*, without any consideration and for no definite time. Respondent could have sued on the note the day after the agreement was made, or Bywaters could have tendered the money and stopped the interest.

There was no consideration for Bywaters' agreement. *Reynolds v. Ward*, 5 Wend. 501; *Kellogg v. Olmsted*, 25 N. Y. 189; *Parmelee v. Thompson*, 45 id. 58; *Abel v. Alexander*, 45 Ind. 523; *Ives v. Bosley*, 35 Md. 262.

The authorities show that where the interest agreed to be paid is the same as the note would have drawn originally, or less, there is no consideration.

The agreement is void because there is no definite period of time for the extension of the time, and respondent could have commenced his action at once. 2 Pars. on Notes and Bills, 250; *Oxford Bank v. Lewis*, 8 Pick. 457; *Blackstone Bank v. Hill*, 10 id. 132; *Central Bank v. Willard*, 17 id. 150; *Shriver v. Lovejoy*, 32 Cal. 574.

BLAKE, J. The respondent brings this action against the makers of the following promissory note :

“HELENA, Mon., September 1, 1873.

“\$745 $\frac{72}{100}$ . Nine months after date, for value received, we promise to pay to the order of Robert S. Hale the sum of seven hundred forty-five and  $\frac{72}{100}$  dollars, negotiable and payable at his business house at the city of Helena, M. T., without default or discount, with two per cent interest per month from maturity until paid, both before and after judgment.

“E. E. BYWATERS,

“J. F. FORBIS.”

The complaint alleges that the interest had been paid to November 1, 1874; and that the respondent then agreed that the rate of interest should be reduced to one and one-half per cent per month from November 1, 1874, until the payment of the note. During the pendency of this action, Bywaters was adjudged a bankrupt and his assignee paid, August 15, 1876, on account of the note, \$246.55. The following memorandum was indorsed upon the note, November 1, 1874: “In consideration of further time being granted, I agree to pay one and one-half per cent interest per month on the within note until paid.

“E. E. BYWATERS.

“November 1, 1874.”

The answer of Forbis alleges that he signed the note as security for Bywaters; that the respondent and Bywaters agreed that the time for the payment of the note should be extended until the spring of 1875; that the rate of interest should be reduced to one and one-half per cent per month from November 1, 1874, until the note should be paid; that Bywaters then signed said memorandum; that the note was canceled under this agreement; and that Forbis had no knowledge of this agreement for the extension of the time of payment, and never consented to or ratified the same.

Forbis died before the trial, and his administratrix, the appellant, was made a party defendant. Upon the trial she offered testimony tending to prove the allegations of the answer of Forbis, but the court excluded it. The jury were instructed that the agreement, which was indorsed upon the note, was void for want of consideration, and its failure to fix a certain period of time for the payment of the note and interest; and that the appellant, or the estate of Forbis, had not been released from liability on the note. Judgment was entered on the verdict for Hale.

How were the rights of Forbis affected by the memorandum of Bywaters upon the note. This note was payable June 1, 1874, and the facts which are set forth in the answer of Forbis occurred five months afterward. The written agreement does not extend the time of payment for a definite space of time, and does not restrict some rights of the parties to the note. As soon as it was signed, Bywaters and Forbis could tender the amount remaining unpaid on the note and demand its surrender or cancellation, and Hale, the payee, was not prohibited from commencing an action to enforce its payment. "To discharge the surety, the contract for new credit must be such as will prevent the holder of the note from bringing an action against the principal." *Blackstone Bank v. Hill*, 10 Pick. 129; *Oxford Bank v. Lewis*, 8 id. 458. "The indulgence, to have the effect of discharging the surety, must be for a definite time." 1 Pars. on Notes and Bills, 240, and cases there cited; 2 Danl. on Neg. Inst., § 1319.

We think it is clear that the memorandum of Bywaters did

not defeat the right of the respondent to maintain this action. But the appellant sought to introduce oral evidence tending to show that the time for the payment of the note was extended for a certain period. Although the agreement was written upon the back of the note, it is not an indorsement within the legal meaning of the term, and, therefore, is not subject to the same rules. The instrument, it is obvious, contains a part of the contract between the respondent and Bywaters, and the remainder may be supplied orally, so that the entire stipulation can be adjusted. "This is not constructing a new bargain, but authenticating and throwing light upon the old." 2 Pars. on Notes and Bills, 514. It was competent for the appellant to show that the words, "further time," expressed one portion of the agreement, and that the respondent promised to extend the time of payment until the spring of 1875. In *Abel v. Alexander*, 45 Ind. 523, the court holds that the agreement of the holders of a promissory note to postpone the time for the payment of the principal sum "until the summer," and afterward, "until the fall," could be made certain by oral evidence, and that the time was extended until June 1 and September 1.

The other question for our investigation relates to the consideration of the agreement of Bywaters and the respondent. By the terms of the note, Bywaters and Forbis promised to pay interest at the rate of two per cent per month until paid, "both before and after judgment." On November 1, 1874, according to the agreement of Bywaters and the respondent, Bywaters promised to pay interest at the rate of one and one-half per cent per month "until paid." Most of the cases and authorities, to which our attention has been invited, interpret contracts which were entered into by the parties before the note became due, and we are inclined to deny their applicability to the case at bar, in which the agreement was made five months after the note was payable. But waiving this consideration, and placing the appellant in the most favorable situation, we intend to assume, in our treatment of this subject, that Bywaters and the respondent entered into this contract on or about June 1, 1874. The following rule is undoubtedly sound. If there was a sufficient consideration for the prom-

ise of Bywaters, Forbis was released from liability on the note; and, if there was no consideration therefor, the rights of the parties have not been suspended.

Upon this matter the decisions are conflicting, and we desire to apply the best principle that can be found in the books. The classes of consideration, which appear in the reports, comprise promises to pay the same rate of interest which is mentioned in the note; or interest in excess of that specified in the note; or interest in advance for a certain time; or a certain sum in addition to the interest; and also promises to perform work or deliver goods besides the payment of the interest. In the limited number of authorities at our command we have not observed a case in which the maker and payee made an agreement for the payment of interest at a rate below that named in the note.

In *Oxford Bank v. Lewis*, 8 Pick. 458, a promissory note was signed by two persons, as the principals, and two sureties, and, after the note was overdue, the principals paid in advance the same rate of interest for sixty days. The court held that the receiving of this interest did not disable the owner and holder from bringing an action on the note at any time, and that the sureties were not discharged. The courts of Massachusetts have adhered to this doctrine.

In *Reynolds v. Ward*, 5 Wend. 501, it is held that a promise by the maker of a promissory note to pay the interest during the time the creditor did not enforce its collection forms no consideration for the agreement to enlarge the period for its payment when the debtor was compelled to pay the interest. In the opinion, Mr. Justice MARCY says: "It was said on the argument that there was an obligatory act in this case by which the plaintiff was bound to delay; that there was a consideration for the promise to forbear. What was that consideration? The promise by Plumb (the maker) to pay interest on the debt so long as the plaintiff should delay. This was a promise to do precisely what he was bound to do without a promise. If the debtor's promise to pay interest creates no additional obligation, it is no consideration for a contract to delay." In support of these views the court refers to the following authorities: *Pabodie v. King*, 12

Johns. 426; *Arundle Bank v. Goble*, Chitty on Bills, 298, note; *Philpot v. Briant*, 4 Bing. 717. The case of *Reynolds v. Ward*, *supra*, is cited with approval by the supreme court of the United States in *Creath v. Sims*, 5 How. 192. In *Kellogg v. Olmsted*, 28 Barb. 96, the answer contained many allegations which are similar to those in the answer of Forbis. The court, by Mr. Justice MARVIN, says: "The debtor's promising to pay interest will be no more than the law will compel him to do, without the promise. If he agrees to pay more than the interest for the forbearance of the debt, the agreement will be void for usury." This case was affirmed by the court of appeals (25 N. Y. 189), and Mr. Justice SUTHERLAND refers to "the well-settled principle that an agreement by a creditor to postpone the payment of a debt due, until a future day certain, in consideration of no other or further consideration than the agreement of the debtor to pay the debt with interest on that day, is void for want of consideration." In *Parmelee v. Thompson*, 45 N. Y. 58, Mr. Justice ALLEN says: "If the only consideration for the promise of the creditor is the performance by the debtor, or a promise to perform some act which the latter is legally bound to perform, the promise is without consideration." The case of *Clark v. Sickler*, 64 N. Y. 231, is directly in point. Mott, the principal in a promissory note, "some time after the note was due, went to the holder with the money to pay it, which the latter \* \* \* declined to receive, giving as a reason that he had no use for the money, and requested that Mott would keep it. \* \* \* Mott was then solvent, and afterward became insolvent." Sickler's intestate signed the note as surety for Mott. The court held that these acts did not discharge the surety.

In *Abel v. Alexander*, *supra*, the authorities are reviewed, and the court holds that an agreement by the principal to continue to pay the same rate of interest specified in a promissory note, which is higher than the legal rate, is not a sufficient consideration to sustain a promise to extend the time of payment, and that such an agreement does not discharge the surety. In *Hunt v. Postlewait*, 28 Iowa, 427, it is held that forbearance given to the principal in a promissory note after the same became due,

upon the payment of the usurious interest originally agreed upon and accrued, was insufficient to release the surety. "Mere delay, even where the holder insists on interest, will not discharge the surety." 2 Danl. on Neg. Inst., § 1316. Prof. Parsons says that "wherever the holder's act does not amount to a binding agreement, as his receiving interest for a stipulated time after maturity, in short, whenever the holder has not disabled himself from suing the principal, the other parties to the paper are not discharged." 2 Pars. on Notes and Bills, 533, note *d*.

We do not deem it necessary to review the cases which state different rules from those that have been laid down. At the time when Bywaters entered into the contract with the respondent, he was bound to pay, under the statutes of the Territory, interest at the rate of two per cent per month during the time of forbearance, which has been defined. If this contract had provided for the payment of the same rate of interest, it would be without a sufficient consideration, and the surety would be discharged. We know of no legal reason for the omission to apply the same principle to the case at bar, in which Bywaters promised to pay a lower rate of interest than the law required. The agreement of Bywaters and the respondent was *nudum pactum*, but the respondent in the complaint does not demand interest in excess of the rate of one and one-half per cent per month, and the judgment is consistent therewith.

WADE, C. J., concurred.

KNOWLES, J., dissenting. I do not agree entirely with the opinion expressed by a majority of the court in this case, and will as briefly as I can express my views for dissenting therefrom.

In the following matters I agree with the majority of the court.

1. A joint maker of a promissory note may show by parol in an action thereon, if the holder knew the fact, that he was only a surety.

2. An agreement for a valid consideration, for an extension of time of payment thereof to a definite and certain period, will release a surety on such an obligation if he is not a party thereto.

3. Where the indorsement on the back of a note shows that there was an agreement to extend the time of the payment thereof it may be shown by parol to what time the extension was made, if it was for a definite period.

Upon the following propositions, I do not agree with the majority of the court. I hold that an agreement to pay interest at a fixed rate, if payment of a note is extended to a definite period, is a good consideration therefor.

I hold that the contract has been altered in this case, and if done without the consent of the surety, he was discharged from any liability thereon.

The principal case cited to sustain the views of the court is that of *Reynolds v. Ward*, 5 Wend. 501. In that case Ward was a surety for Plumb. Plumb, before the note became due, made an agreement with the payee thereof, Reynolds, to extend the time of the payment until such time as he, Reynolds, should build a house in Rochester, and then he was to pay principal and the interest due thereon. No rate of interest was fixed. The court held in that case that there was no consideration for the agreement to extend the time. It bases its opinion upon this reasoning. The payee of a note can consent or agree to forbear the collection of a note or the payment thereof. If there is no consideration for this agreement it is a *nudum pactum*. During this forbearance interest according to law will run on this note. If the agreement is only for legal interest the law gives this, and hence no consideration by virtue of this agreement does pass. The court says this case is not to be distinguished from that of the case of *Pabodie v. King*, 12 Johns. 426, or that of *Fulton v. Mathews*, 15 id. 433.

In the case of *Pabodie v. King*, the principal paid \$50 on his debt and the payee agreed to extend the time. The court say there was no consideration for this agreement. The principal was owing this money and hence I am satisfied no consideration did pass for the agreement to extend the time. The authorities, however, are not unanimous in support of this decision. In the case of *Fulton v. Mathews*, the time of the payment of a note was extended by agreement and there was no pretense of any

consideration for this agreement. I think most courts would be able to distinguish between these cases and that of *Reynolds v. Ward*. The court in this case failed to draw the distinction between interest which a person contracts to pay and that which the law awards. They do not depend upon the same rule. Parsons on Notes and Bills, 2d vol., 392, in speaking of interest, says: "When expressed the words used by the parties determine their rights." Id. 394. "Interest is to be considered as a part of the debt where it is expressed, for in such cases it enters into the understanding of the parties and it is declared by them to be a part of their bargain." Id., note *p*, on page 395, shows that interest when agreed upon is a part of the contract. Id. 394. "Where interest is not expressed by the parties but is given by the law here, it is certainly to be taken as damages for the non-payment." Under our statute upon the subject of interest, and I suppose under most statutes, interest is only allowed by law after a demand is due, where there is no agreement therefor. This must be considered as damages provided by law for the non-payment of the same then. But when a person agrees to pay interest on a note or contract to pay money before the same becomes due then there must be some consideration for this agreement to pay interest, and it is usually use of money for a time. "Interest is the compensation which is paid by the borrower of money to the lender for its use, and generally by a debtor to his creditor in recompense for his detention of the debt." Bouvier's Law Dict., "Interest." When a person then agrees to pay another interest for the use of money for a certain time, and there is an agreement on the part of the latter that the former shall have this time in which to use the money, there is certainly a contract and it is a valid contract. The interest is given for the use of the money for a definite time, and the promise to allow the use of the money for that time is a good consideration for the interest. In the case of *Reynolds v. Ward* there was a contract for the use of money for a certain time, or for a time that could have been rendered certain, and an agreement to pay interest for the use of that money for that time. If that was not a valid contract I do not know what one is. Be-

cause the law would have given Reynolds the same interest as damages that he was to receive by contract for the use of his money, should not induce a court to say such a contract was void. To hold thus would be to say that whenever a merchant should settle up an account with a customer, and find the amount due thereon, and then should take a promissory note payable in a certain time therefor, with legal interest, that such a note was a *nudum pactum*. The debt was due when the note was given; the interest is only just what the law would allow as damages for the non-payment of the debt from the time of settlement. The rule that a promise to pay the legal rate of interest is a good consideration for an agreement to extend the payment of an obligation for a reasonable time is supported by the cases of *McComb v. Kittridge*, 14 Ohio, 347; *Blizer v. Bundy*, 15 id. 57.

In quite a number of cases it is held that a contract to pay usurious interest is a sufficient consideration for an agreement to extend the time of the payment of an obligation. *Kelly v. Gillespie*, 12 Iowa, 55; *Currelle v. Allen*, 13 id. 289.

In the case of *Rose v. Williams*, 5 Kans. 483, it was held that the payment of interest in advance was a good consideration for an extension of the time of the payment of a promissory note. Other cases, however, maintain a different rule. The rule in Kansas, however, I think the correct one, for the promise to pay interest is a good consideration for the use of money.

The reason, as I have said, which was assigned in the case of *Reynolds v. Ward*, for the holding that the promise to pay interest was no consideration for an extension of time of payment, was that the interest agreed upon was the same the law would have given for the forbearance to sue on the demand. No such reason, however, can be assigned in this case. The note Forbis signed bore two per cent per month interest. The law would imply, I suppose, at least I will take it for granted, that the note after due would bear two per cent per month interest. Certainly it would not imply that it bore one and one-half per cent per month interest. The contract in this case was that the note should, from November 1, 1874, until the following spring, bear one and one-half per cent per month interest, and the plaintiff,

in consideration of that interest, agreed to extend the payment thereof for that time. That is what we must consider as proven. The reasoning in that case does not apply to this case. Here was an agreement for a different rate of interest from what the law would declare collectible without the agreement.

Hale and Bywaters made a new contract. The plaintiff recognizes this, for he brings his action, it is evident, on the contract as modified. The judgment in this case, it is evident, rests upon this new contract, and yet the reason given for sustaining it is, that it is not a valid contract. To show that this action is brought on the new contract, I have but to present the allegations of the complaint. First, the original promissory note is set forth, and an allegation that no part of the principal has been paid; then an allegation that the interest was paid until November 1, 1874; then this allegation: "That on the said 1st day of November, 1874, the said plaintiff agreed with the said defendants to reduce the said rate of interest named in the said promissory note to one and one-half per cent per month from the day last aforesaid until the said note should be paid."

The interest on the note is calculated in the allegation of the amount due at the rate of one and one-half per cent per month. The prayer in the complaint is for one and one-half per cent interest per month on the principal. There is no allegation that the note was, from that time, to bear two per cent per month. In fact, there is nothing that can be called an allegation that the defendants ever agreed to pay any other interest than one and one-half per cent per month, unless the copy of a promissory note should be treated as allegations of all it recites, which I do not think good pleading.

Again: The contract in this case has been changed. It is not the contract Forbis signed. In the answer of the defendant Forbis it is alleged that the change was made; that he never signed this new contract; never consented to it or knew of its existence. And this, in his replication, the plaintiff does not deny, only that he did not agree to extend the time until spring. This Forbis offers to prove, and was not allowed to, and the ruling excluding this evidence is assigned as error.

"When to a note already complete a memoranda is added, or words inserted varying the legal effect of its stipulations, the alteration is material." 2 Pars. on Bills and Notes, 545

"An indorsement on the back of a note may be a part and parcel of the original instrument." Id.

There cannot be any doubt but that the indorsement on the back of this note became a part of the original note. It varied a stipulation therein, in regard to interest. From November 1st, 1874, up to this time, that has not been the same instrument in regard to interest. The plaintiff has not treated it as the same instrument, but as I have shown, a different instrument.

If a promissory note be made payable with lawful interest, and after it is signed, there be added, without the assent of the maker, in the corner of the note, words expressing a different percentage of interest, the addition is fatal. 2 Pars. on Notes and Bills, 545.

In the case of *Birckhead v. Brown*, 5 Hill, 641, the court uses this language: "Courts are not at liberty to speculate upon the question whether the surety has or has not been injured by a departure from the terms of his contract." Again He has a right to say "that is not my contract." "And as long as he can give this answer truly, he cannot be charged with the debt of his principal."

When a contract is changed or varied that releases all parties to the same who do not consent to such change. *Smith v. United States*, 2 Wall. 219; *Miller v. Stewart*, 9 Wheat. 681; *Leggett v. Humphreys*, 21 How. (U. S.) 66.

Many cases might be cited to show that a surety has the right to stand on the strict letter of his contract and can only be bound by it. The plaintiff acknowledges that he has changed the contract in regard to interest, without the consent or knowledge of Forbis, the surety.

If this is not a material change of a contract, I do not know what is a material change. And being a material change in the contract, the surety was discharged.

My opinion is most firmly fixed that for the reasons I have named, the judgment of the court below should be reversed.

The points I have presented were presented in the briefs of appellant. If I were disposed to raise points outside of the briefs of appellants, I think I could show that the complaint herein does not state facts sufficient to constitute a cause of action.

*Judgment affirmed.*

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HOOTMAN, respondent, v. BRAY, appellant.

**PLEADING.** Before an attaching creditor can assail the title of a third party in possession of the attached property, claiming ownership, the pleadings must show that the attachment was issued by a court having jurisdiction, and upon a proper and sufficient affidavit. The want of such showing is a fatal defect, and the refusal of the court below to allow the filing of such a pleading, after the evidence had been submitted to the court, was no error.

*Appeal from Second District, Beaver Head County.*

C. W. TURNER, for appellant.

Defendant should have been allowed to file his amended answer, in furtherance of justice, on proper terms. Code of Civ. Proc., 1877, § 114; *Kirstein v. Madden*, 38 Cal. 163; *Thomas v. Nelson*, 69 N. Y. 119; *Wormall v. Reins*, 1 Mon. 630; *Hartley v. Preston*, 2 id. 415.

Defendant's application for a new trial, on the ground of newly-discovered evidence, was in accordance with established principles.

The court erred in refusing testimony offered by defendants to show that vendor claimed title in himself down to the time of the attachment. 1 Greenl. Ev., § 462.

PATRICK TALENT, for respondent.

Questions of discretion of the court below cannot be reviewed in the supreme court, except in cases of gross abuse. *Speck v. Hoyt*, 3 Cal. 413; 5 id. 85.

Amendments after trial are allowed with great caution, and not without good cause shown. Van Santv. Pl. 814.

Defendant did not bring himself within the rule established by former decisions of this court.

Neither the proof nor the pleadings of defendant placed him in condition to assail the title of plaintiff. *Thornburgh v. Hand*, 7 Cal. 554.

The proposed amendment was not based upon any evidence given on the trial, but was a separate and distinct defense not allowed by any rules of pleading. *Van Santv.* Pl. 811-12.

There was abundant evidence to support the judgment, and courts will not set aside a judgment in such cases. *Kile v. Tubbs*, 32 Cal. 333.

A vendor is not a competent witness to impeach a sale made by himself. *Howe v. Scannell*, 8 Cal. 325; 13 id. 58; 15 id. 50.

Even the amended pleadings that defendant sought to file are fatally defective. Before an officer can seize property in possession of a stranger to the writ, he must plead specially in justification of such act all facts necessary to support the writ. *Van Etten v. Hurst et al.*, 6 Hill, 311; *Noble et al. v. Holmes*, 5 id. 195.

The pleading offered as amended contains no averment that an affidavit was made to justify the issuance of attachment. 7 Cal. 554.

WADE, C. J. In this action the plaintiff seeks to recover the possession, as owner thereof, of certain personal property seized in attachment, by the sheriff of Beaver Head county, at the suit of Thomas and Armstrong, partners, against one Ephraim W. Sigsbee. The answer of the defendant denies the ownership and possession of plaintiff, and alleges that his interest in the property is that of a mortgagee by virtue of a certain mortgage executed by Sigsbee and wife to him on the 10th day of September, 1877, to secure the payment of a promissory note executed and delivered by Sigsbee to plaintiff on that day, for the sum of \$1,387, and that the attachment was levied upon the property subject to such mortgage.

The replication of the plaintiff admits the levy of the attachment, and the execution and delivery of the mortgage as alleged, but denies that the same had any force or effect, for the reason that long before the levy of the attachment, to wit, on the 25th day of September, 1877, Sigsbee sold and delivered to the plaintiff

iff all his interest in and to the mortgaged property for a valuable consideration, a part of which was the surrender of the Sigsbee note which the mortgage to plaintiff was given to secure, and that from that date until the levy of the attachment, the plaintiff had remained in the actual and continued possession of the property.

The cause was tried by the court sitting without a jury, and after the introduction of the testimony on both sides, and after the case had been substantially decided, the defendant presented an amendment to his answer, in which he attacked the sale from Sigsbee to plaintiff as fraudulent and void, and alleged an indebtedness from Sigsbee to the attaching creditors, which the original answer had failed to do, and asked leave to file the same, and to introduce proof in support thereof, which application to amend was refused by the court, and this refusal is assigned as error.

Neither the original answer nor the proposed amendment contain any averment showing that the attachment was regularly issued by a court having jurisdiction, and this we hold is a fatal defect, in a case like the one we are considering, where the plaintiff claims the property by a prior sale and the officer attempts to justify the levy, by impeaching such sale for fraud. In the case of *Noble and Eastman v. Holmes*, 5 Hill, 195, the court say: "As a general rule process regular upon its face is sufficient for the protection of the officer although it may have been issued without authority. But when an officer attempts to overthrow a sale by the debtor on the ground of fraud, he must go back of his process and show authority for issuing it. If he act under an execution, he must show a judgment; if he seize under an attachment, he must show the attachment regularly issued." In the case of *Van Etten v. Hurst*, 6 Hill, 313, the court say: "The defendants evidently intend to attack the plaintiff's title to the goods under the sale from Simon Van Etten, on the ground that the sale was fraudulent and void as against creditors. True, the pleas say nothing about creditors, and it is possible that the sale was bad for some other fraud. But a special pleader is not at liberty to leave his pleadings open to different constructions

and then take his choice between them. \* \* \* But there can be little doubt that the defendants mean to attack the sale on the ground that although it may be good as between the parties to it, it was fraudulent and void as against creditors. To do this they must show a judgment as well as execution; or where, as in this case, they proceed by attachment, they must show that the justice had jurisdiction, and that the process was regularly issued. And this is necessary to the justification of an officer as well as the creditor." See *Jansen v. Acker and Rich*, 23 Wend. 481; 2 Phillips' Ev. (5th Am. ed.); Cowen & Hill's Notes, note 293.

In the case of *Thornburgh v. Hand*, 7 Cal. 563, the court say: "An officer who seizes property in the hands of a debtor may justify under the execution or process, but when he takes property from a third person who claims to be the owner thereof, if on execution, he must show the judgment and execution; if on attachment, the writ of attachment, and, as we think, the proceedings on which it was based."

And in order to make this justification, the same must be pleaded, and the answer must show that the attachment was based upon a proper and sufficient affidavit. *Crawford v. Mead*, 7 Ala. 157.

It follows, therefore, that the amended answer contained no defense to plaintiff's action and there could have been no abuse of discretion in the court refusing permission to file such an answer.

Judgment affirmed with costs.

*Judgment affirmed.*

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GILLETTE, respondent, v. HIBBARD ET AL., appellants.

STATUTE OF LIMITATIONS — *effect on causes of action existing at the time of its passage — effect on the remedy.* When a cause of action has arisen under a given limitation act the same becomes a rule of property. Limitation acts cannot have a retrospective action, else they would interfere with vested

**rights of property.** If before the expiration of the period of limitation existing when a cause of action arose, a new statute is enacted providing a different period, the effect thereof, when there are no express words to the contrary, is to give a new lease of life to such cause of action for the period provided in the new act, and not till the expiration of such period can the new act be pleaded in bar.

**INTEREST.** Interest on a note after due must be computed at the statutory rate of ten per cent per annum, unless the note contains a special provision that the higher rate shall be paid after or before due.

**SUFFICIENCY OF COMPLAINT.** If the complaint does not support the judgment, the objection can be made for the first time in the supreme court. *Territory ex rel. Blake v. Virginia Road Co.*, 2 Mon. 96, quoted and affirmed.

### *Appeal from First District, Gallatin County.*

THE suit in this case was begun before the expiration of the period of limitation provided by the statute in force at the time the cause of action arose, but after a new Statute of Limitations had gone into effect providing a shorter period of limitation. The case turned upon the application of the new statute.

The case was tried by BLAKE, J.

SANDERS & CULLEN and SHOBER & LOWRY, for appellants.

The notes were barred by the Statute of Limitations in force at the time suit begun. Code of Civ. Proc., 1877, ch. 3, § 41; *Pierce v. Toby*, 5 Mete. 168; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Webster v. Cooper*, 14 id. 488; *Pierce v. Patten*, 7 B. Monr. 172; *Prichard v. Spencer*, 2 Ind. 486; *DeCordova v. Galveston*, 4 Tex. 470; *Willard v. Hiney*, 24 N. H. 344; *Phorrs v. Walters*, 6 Iowa, 380; *Howell v. Howell*, 15 Wis. 55; *Smith v. Briggs*, 6 R. I. 557; *Callaway v. Nally*, 31 Mo. 393; *Bresley v. Spencer*, 25 Ill. 216; *Stone v. Bennett*, 13 Minn. 153; *Coady v. Reins*, 1 Mon. 424; Sedgwick on Stat. and Const. Law, 134-5, 221-3; Angell on Lim. 16-19; Code of Civ. Proc., 1877, §§ 28-612.

Courts have no power to enlarge the time within which the statute requires an act must be done. Sedgwick on Stat. and Const. Law, 322-3, 659.

The complaint does not sustain the judgment. There was an erroneous computation of interest. *Davis v. Hendrie*, 1 Mon. 499; *Brewster v. Wakefield*, 22 How. (U. S.) 118; *Talcott v. Maston*, 3 Minn. 344.

SAM. WORD, for respondent.

Under the construction of law urged by appellants the plaintiff would be deprived of his legal right of remedy. In that view the act would be unconstitutional. 10 Cal. 374; 6 id. 430; 27 Mo. 442; *Thompson v. Alexander*, 11 Ill. 54; *Watkins v. Haight*, 18 Johns. 138; *Sayer v. Wisner*, 8 Wend. 661; Code of Civ. Proc., 1877, §§ 28, 41.

In absence of express provisions no statute will be allowed to have a retrospective effect. *Murray v. Gibson*, 15 How. (U. S.) 421; Code of Civ. Proc., 1877, § 28.

Where a law reducing existing limitation takes effect before a claim is barred, its operation is prospective entirely. The new statute commences to run, as regards said claim, at the time the latter is subjected to its action. *People v. Lord*, 12 Hun, 282; 10 Cal. 305, 374; 6 id. 430; *Sohn v. Waterson*, 17 Wall. 596; *Lewis v. Lewis*, 7 How. 778; 13 Peters, 62; 8 Wend. 661; 2 Denio, 582.

If complaint is defective defendants waived the same by not having it made specific by motion. Pomeroy's Remedies, § 549.

The complaint states a good cause of action, and its defects were cured by verdict. This court will presume that there was enough before the court below to authorize the verdict. *Frohner v. Rodgers*, 2 Mon. 183; *Fabian v. Collins*, ante, p. 215; *Russell v. Mixer*, 42 Cal. 475; *Mills v. Barney*, 22 id. 251; Pomeroy's Remedies, §§ 548-50.

There was no motion for a new trial, and the objection cannot be made in this court for the first time. *Morse v. Swan*, 2 Mon. 306; *Allport v. Kelley*, id. 343.

WADE, C. J. This is an action upon two certain promissory notes executed by the defendants to King and Gillette, each for the sum of \$172 75, bearing date March 25, 1868, and payable in sixty and ninety days from date, with interest at the rate of three and one-half per cent per month. On the 23d day of April, 1868, the defendants paid \$82.50 on the thirty-day note, and afterward both notes were sold and delivered to the plaintiff. There was a demurrer to the complaint, which was overruled, and

hereafter the defendants answered, admitting the execution of the notes, but averring that the action was barred by the Statute of Limitations. The court found that the action was not barred by the statute, and this decision is one of the errors complained of.

1. The limitation act in force when the notes were executed and became due required an action thereon to be commenced within the period of ten years from the time when the cause of action arose. On the 16th day of February, 1877, and one year and nine days before an action on the notes would have become barred by the statute in force when they were executed, the legislature repealed such statute, and enacted the following limitation act, which went into effect on the first day of the following August: "An action upon any contract, obligation or liability, founded upon an instrument in writing, shall be commenced within six years."

It is not necessary to cite authorities to show that limitation acts affect the remedy, and not the right. And we also believe it equally capable of demonstration, that when a cause of action has arisen under a given limitation act, such act thereby becomes a rule of property, and that the right to commence such action within the period of limitation cannot be restricted or taken away without impairing vested rights; that is to say, that limitation acts cannot have a retrospective action. They must speak and operate on the future only.

We have adopted the Practice and Limitation Acts of California. The decisions of the supreme court of that State under these acts ought, therefore, to be precedents here. Early in the judicial history of that State, in the case of *Nelson v. Nelson*, 6 Cal. 430, the court say: "Statutes of Limitation do not act retrospectively, they do not begin to run until they are passed, and our statute is not yet as old as the time which it fixes to bar a claim like this." Therefore, that Statutes of Limitation could not be pleaded until the period fixed by them had fully run since their passage. See, also, to the same effect, *Billings v. Hall*, 7 Cal. 1; *Lehmaier et al. v. King*, 10 id. 373.

But if these decisions in California are not authoritative, those of the supreme court of the United States, to which court appeals

from this court are directly taken, it will not be disputed, are controlling and must be followed by us when applicable and in point. The authority of the case of *Sohn v. Waterson*, 17 Wall. 596, if applicable to the one we are considering, cannot be avoided or denied. In that case, Sohn, a citizen of Ohio, in 1864 obtained a judgment in that State against Waterson. Soon after this Waterson went to Kansas, and from 1854 became and remained a citizen of that State. On the 10th day of February, 1859, the legislature of Kansas enacted a Limitation Act which provided that all actions on judgments, promissory notes, etc., rendered or made beyond the limits of the Territory shall be commenced within two years next after the cause or right of action shall have accrued, and not after. In 1870 Sohn, being still a citizen of Ohio, and Waterson a citizen of Kansas, commenced an action in the circuit court for the district of Kansas against Waterson, to recover the amount of the judgment which he had obtained against him in Ohio in 1854.

The defendant pleaded the above quoted statute of Kansas, namely: That the action did not accrue within two years next before the commencement of the suit. There was a demurrer to the plea, and a judgment for the defendant on the demurrer.

In deciding the case, the court below said: "As the defendant was a resident of this State when the act of February 10th, 1859, took effect, it is our opinion that the two years limitation therein provided began to run in favor of the defendant as against the present cause of action from that period, and that this action might have been brought at any time within two years after that act went into operation. Not having been brought within that period, it was barred." Justice BRADLEY, in reviewing the case and speaking for the entire court, says: "The court below held that as the defendant was a resident of Kansas when the act took effect, the time of limitation began to run in his favor as against the present cause of action from that period, and that the action might have been brought at any time within two years afterward; and not having been so brought within that period, was barred. In other words, the court held that the act was prospective in its operation, and affected existing causes of action only from the

time of its passage. This seems to us a reasonable construction and one that prevents the legislative intent from being frustrated.

‘Words of a statute,’ says Justice PATERSON, ‘ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.’ *United States v. Heth*, 3 Cranch, 413. And this rule is repeated in this court in *Harvey v. Tyler*, 2 Wall. 347, where it is said: ‘It is a rule of construction that all statutes are to be considered prospective unless the language is express to the contrary, or there is a necessary implication to that effect.’” In giving limitation acts a prospective operation, the same authority further says that three different modes have been adopted by different courts: “One is to make the statute apply only to causes of actions arising after its passage. But as this construction leaves all actions existing at the passage of the act without any limitation at all (which it is presumed could not have been intended), another rule adopted is, to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for prosecution before the statutory time expires — which reasonable time is to be estimated by the court — leaving all other actions accruing prior to the statute unaffected. The latter rule does not seem to be founded on any better principle than the former. It still leaves a large class of actions entirely unprovided with any limitation whatever, or as to them is unconstitutional, and is a more arbitrary rule than the first. A third construction is that which was adopted by the court below in this case, and which we regard as much more sound than either of the others. \* \* \* ‘The question is,’ says Chief Justice TANEY, in *Lewis v. Lewis*, 7 How. 778, ‘from what time is this limitation to be calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action is first subjected to the operation of the statute, unless the legislature has otherwise provided.’”

From this decision and those cited therein, we hold it conclu-

sively determined that limitation acts, in order to preserve the rights of parties, in whose favor causes of action exist at the time of their passage, must be taken to act prospectively and not retrospectively, and as to such causes of action, the statute commences to run when the cause of action is first subjected to its operation. This certainly is the case unless the act, by express language, or necessary implication, provides to the contrary. When there is no such provision, the limitation act takes hold of causes of action existing at the time of its passage, and gives to them a new lease of life for the period provided in the act, and not until the expiration of such period can such act be pleaded as a bar.

It cannot be supposed that our legislature, by the passage of the act of February 16, 1877, which was to take effect on the first day of the following August, intended thereby to cut off all right of action upon causes of action that had accrued more than six years prior to the last-named date, for such an intention, if carried into effect, would impair the obligation of contracts. Neither can it be supposed that the intention was to leave all actions accruing six years prior to that date without any limitation whatever, for such intention, if carried out, would be equally unconstitutional. What, then, was the intention? Evidently to give to the act of February 16, 1877, operation as to all causes of action thereafter to arise, and as to all causes of action existing at the time of its passage, to add its period of limitation to them, thereby preventing them from becoming barred until such period had expired. That is to say, the new statute commences to run from the time the existing cause of action is first subjected to its operation, the same as if the cause of action had arisen under such statute, and not until the period of such statute has fully expired, could the same be pleaded in bar to a cause of action existing at the time of its passage.

Neither can it be supposed that the legislature intended by postponing for five or six months the time when the act of February 16, 1877, should go into effect, to require all existing causes of action to be prosecuted within that period of delay, or be thereafter barred. There is no language in the act to express or

to intimate any such intention, and no presumption of the kind arises.

This action was commenced on the 7th day of December, 1877, three months and eighteen days before the same would have become barred by the ten-year limitation in force at the time the cause of action arose. Neither was it barred by the act of February 16, 1877, for the period of its limitation (six years) had not expired and therefore that act could not be pleaded in bar.

From these considerations it follows that on the 16th day of February, 1877, the plaintiff's cause of action, which would have become barred on the 25th day of March, 1878, received a new lease of life, for the period provided in the limitation act of that year. This is the rule of safety and of honesty. And though statutes of limitation are regarded as statutes of repose, they ought never to be so construed as to blot an existing cause of action out of existence until the full period of limitation acting upon it has expired.

2. There was an exception to the findings and to the judgment rendered herein. Looking at the amount of the judgment it is evident that there has been a wrong computation of interest on the notes, or some other mistake, whereby the judgment rendered is much too large. The complaint does not support the judgment, and in such cases, objection may be made for the first time in this court. *Territory ex rel. Blake v. Virginia City Wagon Road Co.*, 2 Mon. 96.

The judgment is therefore reversed and remanded for the purpose of having a judgment rendered for the plaintiff for the amount legally due upon the notes sued on.

*Judgment modified.*

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O'BANNON, appellant, v. CHUMASERO, respondent.

STATUTE OF FRAUDS — *letter expressing consideration of agreement.* O., the clerk of the district court, notified C, an attorney for P., that he would not make out a transcript on appeal for P. unless C. would guaranty the payment of his fees. C. then wrote a letter to O. and said: "You will please make out

the record in the P. \* \* \* case and we will guarantee the payment of your fees by him, P. \* \* \*." The letter directed O. to complete the record by a specified time, so that it might be used for certain purposes by P., and also call upon B. for information and advice about P.'s case. O. then made out the record and brought this action against C. upon the failure of P. to pay his fees. *Held*, that the consideration of the agreement in writing, within the meaning of the statute concerning "conveyances and contracts," was expressed in C.'s letter to O.

*Appeal from Third District, Lewis and Clarke County.*

THE demurrer to the complaint of O'Bannon was sustained by WADE, C. J., and judgment was entered for the defendants, Chumasero and Chadwick.

E. W. & J. K. TOOLE, for appellant.

There is no privity of contract between appellant and Plaisted. There was no indebtedness in existence to which the promise of respondents could be collateral. The consideration for it was doing the work. It operated directly in procuring the services rendered, and would be good if it rested solely in parol. *Smith's L. C.* (5th Am. ed.) 374; *Decatur Bank v. St. Louis Bank*, 21 Wall. 294; *Yale v. Edgerton*, 14 Minn. 194; *McLendon v. Frost*, 57 Ga. 448; *Case v. Howard*, 41 Iowa, 479; *Booth v. Eighmie*, 60 N. Y. 238; *Worcester Bank v. Hill*, 113 Mass. 25; *Hilliard v. Hons*, 37 Tex. 717; *Ashton v. Bayard*, 71 Penn. St. 139; *Reed v. Fish*, 59 Me. 358; *Boehne v. Murphy*, 46 Mo. 57.

It is an agreement on the part of an attorney of this court to pay the costs of his client. These obligations of attorneys are always enforced regardless of the Statute of Frauds. *Browne on Frauds* (5th ed.), § 214; *Evans v. Duncan*, 1 Tyrw. 283, citing *Senior v. Butt*, K. B. 1827.

The performance of the labor is the consideration of the promise, which can be inferred from the letter of respondents to appellant. *Browne on Frauds* (5th ed.), §§ 191, 399, 400, 418; *Stadt v. Lill*, 9 East, 348; *Church v. Brown*, 21 N. Y. 315; *Rankes v. Todd*, 8 Ad. & El. 846; *Stadt v. Lill*; S. C., 1 Camp. 242; 1 Chitty on Cont. (11 Am. ed.) 62, 741, 742, 761, note a.

If this can be considered an obligation to answer for the debt, default or miscarriage of another, it fully satisfies the requirements of our statute. Cod. Sts. 393, § 12. It is in writing, signed by the party to be charged therewith, and expresses the consideration.

CHUMASERO & CHADWICK, *pro se*.

The guaranty of respondents must be in writing, expressing the consideration. No consideration is expressed in the respondent's letter, and therefore there is no liability. In England, the statute does not contain the clause, "expressing the consideration," and such a promise is held to be within the statute. *Barber v. Fox*, 1 Stark. 215; *Fell on Guaranty*, 4-8, 22-31, 33-40; Cod. Sts. 393, § 12.

Respondent's promise was collateral and within the statute of the Territory. *Fell on Guaranty*, 32-34, 40.

Appellant performed services for Plaisted, not respondents. The guaranty was that Plaisted should pay therefor, not that respondents should be charged. The promise was not an original one. The letter does not express any consideration. Respondents, as attorneys for Plaisted, could order the transcript from the clerk of the court, and incur no liability. The statute of California is the same as ours and has the words "expressing a consideration." It is there held that the consideration must be expressed in writing. *Clay v. Walton*, 9 Cal. 328; *Ellison v. Jackson W. Co.*, 12 id. 542; *Throop on Verbal Agreements*, § 195.

The cases cited by appellant were decided in States where the statutes are different from ours and are inapplicable. The liability of attorneys for their clients' costs in England is based on a rule of court, that has no application to our law.

BLAKE, J. The complaint alleges that the appellant was the clerk of the district court in the second judicial district of this Territory at a certain time; that the respondents were the attorneys of Plaisted, who was a party to a case that was tried and determined in said district; that Plaisted wished to appeal from

the judgment entered in the case ; that the respondents as such attorneys requested the appellant, as such clerk, to make out and certify to the supreme court of the Territory a transcript on appeal therein ; that Plaisted was insolvent, and the appellant refused to comply with this request, unless his fees were paid in advance, or the respondents would guaranty the payment of the same ; that the appellant in a letter notified the respondents of these facts, and that the respondents then guaranteed the payment of said fees by the following writing :

“HELENA, M. T., *July* 11, 1872.

O. B. O'BANNON, Esq. :

Dear Sir — You will please make out the record in the Plaisted and Nowlan case, and we will guarantee the payment of your fees by him, Plaisted.

For information concerning the same, please call on James H. Brown, who will advise with you.

The record should be completed by the first day of August, so that it may be filed in time.

We may not desire to have any thing done in supreme court, as it may be settled by sale of the property ; but the case can be docketed in supreme court, and rest there.

Truly yours,

CHUMASERO & CHADWICK.”

The complaint further alleges that the appellant, on the receipt of this guaranty, and in compliance therewith, made out and certified a transcript in the case as such clerk, and delivered it to the respondents ; that the fees for said services of appellant were \$304.65 ; and that payment thereof had been demanded of the respondents, who refused to pay any part of the same.

The respondents demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and, upon the failure of the appellant to file an amended complaint, rendered judgment for the respondents for their costs.

The determination of this case depends upon the construction of the following section of the statute concerning “ conveyances

and contracts:" "In the following cases any agreement shall be void, unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing, and subscribed by the party charged thereunto: First. Every agreement that, by the terms, is not to be performed within one year from the making thereof. Second. Every special promise to answer for the debt or default or miscarriage of another." \* \* \* Cod. Sts. 393, § 12.

We refrain from discussing the proposition of the appellant, that the respondents would have been liable to the appellant if the agreement had been in parol. The contract before us is in writing, and subscribed by the respondents. Does the foregoing letter express the consideration of the agreement? If this question is answered in the affirmative, we must hold that the complaint is sufficient.

Let us consider the situation of the parties. The appellant had the statutory right to demand in advance the payment of the fees prescribed by law for his services. He had not only performed no labor before he received the writing from the respondents, but he declined to make out the transcript on appeal for Plaisted unless certain conditions precedent were complied with by Plaisted or the respondents. The respondents, with a knowledge of these facts, expressed in clear language their request and guaranty in the foregoing letter to the appellant. Afterward the appellant prepared the record, which was necessary to enable Plaisted to appeal to the supreme court of the Territory. The appellant did not file the transcript in the office of the clerk of this court, but delivered the same to the respondents, not Plaisted. It appears from said writing that the respondents requested the appellant to perform this work within a definite time, in order that they might use the transcript, if necessary, for certain purposes. The perfection of the appeal by Plaisted, by filing the record, and causing it to be placed upon the docket of this court, devolved upon the respondents, who were in the possession and control of the transcript which had been prepared by the appellant.

Did this letter of the respondents express the consideration of

the agreement within the meaning of the statute, *supra*? In *Stadt v. Lill*, 9 East, 348, the defendant gave the following written guaranty: "I guarantee the payment of any goods which J. Stadt delivers to J. Nichols." It was objected at the trial that this guaranty was void under the fourth section of the Statute of Frauds of 29 Car. 2, ch. 3, because there was no consideration stated for the promise. "But Lord ELLENBOROUGH was of the opinion that the stipulated delivery of the goods to Nichols was a consideration appearing on the face of the writing, and when the delivery took place the consideration attached." This ruling was affirmed, and has been recognized as authority in many English and American decisions.

The courts of New York have interpreted the same clause which is relied on by the respondents to uphold the judgment of the court below. In *Rogers v. Kneeland*, 10 Wend. 219, Morgan & Sons, in an instrument in writing, requested Rogers & Sons to pay Kneeland the damages, costs and attorney's fees which Kneeland might expend in defending a suit brought against Kneeland on account of a sale of cotton owned by Morgan & Sons. Rogers & Sons made the following indorsement thereon: "We will promptly comply with the request of Morgan & Sons as contained in the within order. New York, August 5, 1832. N. Rogers & Sons." The counsel for Rogers & Sons contended that no consideration for their promise appeared upon the face of their writing. Mr. Justice NELSON reviews the English authorities, in which this statutory provision was first announced as a rule of law, and holds that the consideration to sustain the promise of Rogers & Sons "was care bestowed and money advanced in and about the defense of the suit, and the payment of the judgment finally recovered, for performing all which the plaintiff (Kneeland) had a right to ask security, and for which expressly the guaranty in question was given." It is also held that this consideration was expressed in the instruments which have been referred to. This case was affirmed in the court of errors. 13 Wend. 115. The same question is discussed in *Church v. Brown*, 21 N. Y. 315, and Mr. Justice WRIGHT, in the opinion, says: "To hold, at this late day, that, for the purpose of satisfying the

statute, a particular form of words, expressive of the consideration, must be written in a guaranty, would be to overthrow a series of decisions extending through the last half century."

In *D' Wolf v. Rabaud*, 1 Pet. 476, Mr. Justice STORY says: "The case of *Wain v. Walters*, 5 East, 10, was the first case which settled the point that it was necessary, to escape from the Statute of Frauds, that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication." Mr. Browne, in his work on the Statute of Frauds, supports these views, and observes: "As a general rule, however, in all cases where the language of the memorandum shows with reasonable clearness that the defendant's promise is designed to procure something to be done, forborne, or permitted by the party to whom it is made, either to or for the promisor or a third party, such act, forbearance or permission, so stipulated for by the defendant, is taken to be the inducement to his promise, and the suggestion of it in his memorandum, preventing him from asserting that his promise is without consideration, suffices to make the memorandum binding upon the plaintiff." § 405, and cases there cited.

We are satisfied that these authorities, which have enforced the rule of law stated in *Wain v. Walters*, *supra*, are applicable to the statute of this Territory. We maintain that the respondents expressed the consideration in said letter in plain language; but those who dispute this proposition must concede that the consideration appears "by necessary implication." The promise of the respondents to pay the appellant for his services in preparing the transcript on appeal was valid, and the court erred in holding that the complaint was insufficient.

*Judgment reversed.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1880.

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Present :

Hon. DECIUS S. WADE, CHIEF JUSTICE.  
Hon. HENRY N. BLAKE, } JUSTICES.  
Hon. WILLIAM J. GALBRAITH, }

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PARKS, petitioner for writ of *habeas corpus*.

**BUTTE CITY CHARTER** — *police magistrate and justice of the peace — de facto officer — habeas corpus.* The provision in the Butte City charter authorizing the mayor to nominate, and with the advice and consent of the city council, to appoint a police magistrate, and conferring upon such officer so appointed the jurisdiction of a justice of the peace is not in conflict with the Organic Act of the Territory, nor with section 1856 of the Revised Statutes of the United States, which provides that justices of the peace in the several Territories shall be elected by the people in such manner as the respective legislatures may provide, but is a substantial compliance therewith.

A *de facto* officer is one who comes into a legal and constitutional office by color of legal appointment or election. Even though the law under which such officer holds be unconstitutional or repugnant to the laws of congress,

he would still be a *de facto* officer, and his title of office can only be inquired into by direct proceeding instituted for that purpose, and not by a collateral proceeding, as in *habeas corpus*.

THE applicant in this case was at the time confined in the Deer Lodge county jail, under commitment issued by the police magistrate of Butte City in that county. The ground of the application was that such magistrate was not a legal officer and his acts were nullities. The application was first made to the judge of the second district and refused. It was then presented to the supreme court at its August term, 1879.

J. C. ROBINSON, for petitioner.

The case is not *res adjudicata* by having once been presented to the judge of second district court and refused. *Ex parte Kelly*, 28 Cal. 414; *Perkins' case*, 2 id. 424; *Ex parte Bull*, 42 id. 197; *Ex parte Murray*, 43 id. 455; *Ex parte Bowen*, 46 id. 112; *Ex parte Ellis*, 11 id. 222.

The offense for which petitioner was committed was one under the Territorial laws, over which a police magistrate had no jurisdiction, only as he was within the laws a justice of the peace.

The United States Laws, Revised Statutes, section 1856, provide that justices of the peace shall be elected by the people, and any other mode provided by Territorial statute is void.

The provision in the Revised Statutes of the United States was adopted in 1873, subsequent to the passage of our Organic Act, and therefore repeals any thing therein in conflict with it.

The legislature did not design to confer upon this officer full powers of a justice of the peace, which are co-extensive with the county limits, but only within the city limits.

This police magistrate was not a *de facto* officer. *People v. Albertsen*, 8 How. Pr. 363; *Wilcox v. Smith*, 5 Wend. 231.

If acting without color of law his acts are void and the petitioner entitled to his discharge.

TOOLE & TOOLE and SANDERS & CULLEN, contra.

The object of section 1856 of the United States Revised Statutes was solely to permit the people of the Territories as contra-

distinguished from Federal officers to determine who should be justices of the peace, in some method to be prescribed by the legislatures of such Territories.

If the statute is to be literally interpreted it would devolve the election of justices of the peace upon all the people without regard to age or sex.

The methods are left to the legislature, and that prescribed in the charter, which is a public act, is a sufficient compliance with the law.

Even if a justice of the peace could not be elected in the manner provided in this charter, still he would be a *de facto* officer, and his title thereto could only be attacked by writ of *quo warranto* by the Territory. 21 Ohio, 610-18 and authorities cited.

WADE, C. J. The prisoner comes before this court on a writ of *habeas corpus*. It appears from the return to the writ that the petitioner, William J. Parks, is imprisoned in the jail of Deer Lodge county by the sheriff thereof under a commitment from the police court of the city of Butte, on a conviction for assault and battery, and that the term of imprisonment has not yet expired.

In this proceeding the petitioner seeks to attack the validity of section 2, article 5, and sections 20 and 22, article 7, of an act to incorporate the town of Butte (11th Session Laws, pp. 80, 86, 87) which sections are in the words following: "Sec. 2. The city council shall have power to appoint all officers except the police magistrate, city attorney, city assessor and marshal, who shall be nominated by the mayor, and by him appointed, by and with the advice of the city council, whose term of office shall be for one year, subject to removal as herein provided."

"Sec. 20. The police magistrate shall have jurisdiction in all cases of violations of the city ordinances, and shall have the same jurisdiction in all civil and criminal proceedings as is now, or shall hereafter be conferred upon other justices of the peace of this Territory, and in all courts of this Territory said police magistrate shall be held to be, and is hereby constituted, a justice of the peace." \* \* \*

"Sec. 22. \* \* \* The police magistrate shall be a justice of the peace in said county, and he shall have the exclusive jurisdiction of all offenses against the ordinances of said city." \* \* \*

Are these sections of the legislative enactment void because in conflict with the act of congress which provides that "Justices of the peace and all general officers of the militia in the several Territories shall be elected by the people in such manner as the respective legislatures may provide?" Rev. Stats. U. S., § 1856, p. 329.

1. The Organic Act of the Territory provides that the judicial power of the Territory shall be vested in a supreme court, district courts, probate courts and in justices of the peace.

And it is further provided, that the jurisdictions of the several courts shall be as limited by law. The act does not limit or restrict the number of justices of the peace that may be had in any township, city or village, and as their jurisdiction depends upon the acts of the legislature, and is as defined by such acts, it was therefore competent for the legislature to establish a justice of the peace court within and for the city of Butte, to define its jurisdiction, and under said section 1856, to provide the manner in which the people should elect a justice of the peace. Is such election provided for in section 2, article 5 of the Incorporation Act? Or do the provisions of such sections so far conflict with section 1856 as to become null and void?

By the act of incorporation, the police magistrate, who is made a justice of the peace to every intent and purpose, is nominated by the mayor, and by him appointed with the advice and consent of the city council. In order to measure the scope and effect of this act of the mayor and council, and to ascertain in fact who acts when a police magistrate and justice of the peace is thus appointed or elected, it will be necessary to see by what instrumentality they act, who for, and what authority.

The act incorporating the town of Butte is by its terms made a public act, and therefore stands on an equality with any other public act of the legislature. Before this act became a law the people of the whole Territory acted upon it, through their representatives in the legislature. And before the act had any effect

whatever upon the people of the town of Butte, it was submitted directly to the qualified voters thereof, who voluntarily approved of the same, and thereby availed themselves of all the privileges, and took upon themselves all the burdens and disabilities it imposed. The people of the town made this charter their own act, and, therefore, whatever act the charter requires to be performed thereby becomes the act of the people. By the terms of the charter the people declared that the mayor and council, whom they were to elect, should, when elected, name the police magistrate and justice of the peace. This magistrate is created in the manner the people prescribe. They adopt a charter, and thereby become clothed with the authority to elect a mayor and council, whose duty they have declared to be, to elect a magistrate in the manner provided. Therefore, it must be held that the people adopted this charter and elected a mayor and council thereunder, for the express purpose of causing the election of a magistrate in the manner provided by the charter. Thus the people dictate who shall be their magistrate. Their voice is heard twice in the matter. Once in the adoption of the charter, whereby they create the office, and once in the election of the mayor and council whose duty they have declared shall be to name the officer. The act of congress contemplates that the legislature shall dictate the manner in which the people (meaning the qualified electors) shall elect this magistrate. The Incorporation Act submits the question directly to the people to say how such officer shall be created, and this we hold equivalent to an election by the people and a substantial compliance with the act of congress.

2. Was this magistrate an officer *de facto*; and if so, can the title by which he holds his office be inquired into in this proceeding?

The general language of the authorities is that an officer *de facto* is one who holds an office and exercises the duties thereof under color of right, as by virtue of an appointment or election, the color of title distinguishing him on the one hand from a mere usurper of an office, and on the other from an officer *de jure*. *Plymouth v. Painter*, 17 Conn. 585; *Mallett v. Uncle Sam G. & S. M. Co.*, 1 Nev. 188; *People v. Sassovich*, 29 Cal. 485; *Town of Decorah v. Bullis*, 25 Iowa, 12; *Rice v. Com.*, 3 Bush,

14; *Brown v. Lunt*, 37 Me. 423; *Hooper v. Godwin*, 48 id. 79; *Greggs' Township v. Jamison*, 55 Penn. 468; *Ex parte Straney*, 21 Ohio, 610; *Pritchett v. The People*, 1 Gilm. (Ill.) 525. In *The King v. The Corporation of Bedford*, 6 East, 369, Lord ELLENBOROUGH said: "An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."

In *The People v. White*, 24 Wend. 539, the chancellor says: "An officer *de facto* is one who comes into a legal and constitutional office by color of a legal appointment or election to the office, and as the duties of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed before they submit themselves to this authority, or call upon him to perform official acts which it is necessary he should perform."

In *Brown v. Lunt*, 37 Me. 428, the court says that a *de facto* officer is: "One who actually performs the duties of the office with apparent right under claim or color of appointment or election. He is not an officer *de jure*, because not in all respects qualified and authorized to exercise the office; nor an usurper who presumes to act officially without any just pretense or color of title. The mere claim to be a public officer will not constitute one an officer *de facto*. There must be at least a fair color of right or an acquiescence by the public in his official acts so long that he may be presumed to act as an officer by the right of election or appointment."

These authorities proceed upon the hypothesis that the office to which the officer is elected or appointed is a legal, constitutional office. The office must be *de jure*, while the officer may be *de facto*. *The Town of Decorah v. Bullis*, 25 Iowa, 12.

It was not questioned at the bar, and it cannot well be doubted that the legislature has authority under the Organic Act to establish the office of justice of the peace for the town or city of Butte. Being legally constituted, it thereby became an office that might be filled by a *de facto* officer, and the magistrate who issued the warrant of commitment herein, having been appointed

to his office by virtue of a statute in full force, holds the same by color of law, and thereby becomes a *de facto* if not a *de jure* officer. And even if the law under which the appointment was made was unconstitutional, it would give color to the appointment, and the officer appointed by virtue thereof would become a *de facto* officer. "The true doctrine," says the court in *Ex parte Straney*, 21 Ohio St. 618, "seems to be that it is sufficient if the officer holds the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the Constitution, will give such color." See, also, the following authorities cited in the foregoing case: *Taylor v. Skrine*, 3 Brev. 516; *Brown v. O'Connell*, 36 Conn. 432; *The State ex rel. Attorney-General v. Messmore*, 14 Wis. 164; *State v. Bloom*, 17 id. 521; *The People ex rel. Ballou v. Bangs*, 24 Ill. 184.

The office of police magistrate and justice of the peace having been legally established in the city of Butte, and the officer having been appointed thereto by virtue of a public act of the legislature in full force, thereby became a *de facto* officer, even though the law authorizing the appointment were repugnant to the act of congress and the organic laws.

3. If the magistrate was an officer *de facto* his judgments will be as unquestionable in the collateral proceedings by *habeas corpus* as if he were a magistrate *de jure*. *Ex parte Straney*, 21 Ohio St. 616. If he holds his office by color of right, though he is not an officer *de jure*, his right will not be inquired into on *habeas corpus*. His title can only be determined in a direct proceeding instituted for that purpose.

There seems to be no conflict in the authorities upon this proposition. See *Ex parte Strohl*, 16 Iowa, 369; *The People v. Sassovich*, 29 Cal. 485, and authorities cited; *The Town of Lewiston v. Proctor*, 23 Ill. 533; *Douglass v. Wickwire*, 19 Conn. 489; *Facey v. Fuller*, 13 Mich. 527; *Bean v. Thompson*, 19 N. H. 290; *Commonwealth v. McCombs*, 56 Penn. St. 436; *Ex parte Pat Murray*, 43 Cal. 455.

Application for discharge is, therefore, denied and the prisoner remanded.

*Application denied.*

## HIGLEY, respondent, v. GILMER, appellant.

**STATUTORY CONSTRUCTION** — *act governing appeals in action brought in 1876 — filing papers "by" a certain date.* A. commenced this civil action April 24, 1876, and obtained a judgment against B. in December, 1878, when a trial was had. The court below extended the time for B. to file his notice of motion for a new trial from December 23, 1878, until January 9, 1879, and also ordered that the bill of exceptions and statement be filed "by" January 20, 1879. B.'s motion for a new trial was filed January 8, 1879, and some affidavits in support of the same were filed January 20, 1879. A. objected to the use of the affidavits on the hearing of the motion, but the objection was overruled and the motion was refused April 4, 1879. *Held*, that the Code of Civil Procedure, approved February 16, 1877, does not govern this appeal, and that the same must be determined under the amendments to the Civil Practice Act, approved February 13, 1874. *Held*, that the affidavits could be filed January 20, 1879.

**PRACTICE** — *allowance of exceptions.* The evidence and many errors relied on by B. did not form a part of any bill of exceptions that had been reduced to form and signed by the judge who tried the cause. *Held*, that this court cannot consider the same on this appeal.

**NEW TRIAL** — *statements of attorney outside of evidence.* The affidavits of B. showed that counsel for A. in arguments to the jury referred to matters which were not in the evidence. No exception was taken or saved to these statements which were embodied in the affidavits after the entry of the judgment. This conduct was one of the grounds in B.'s motion for a new trial. *Held*, that this court cannot consider this ground of the motion, because no exception was taken to the statements when they were made.

**CASE AFFIRMED.** The case of *Kinna v. Horn*, 1 Mon. 597, holding that an exception should be saved to the action of the court when the conduct of an attorney is complained of, affirmed.

**EVIDENCE** — *cross-examination refused on matters afterward offered as rebuttal.* Upon the trial, the court refused to allow B., upon the cross-examination of A., to inquire concerning some matters, which had not been testified about and were afterward offered in rebuttal by A. The evidence was not before this court for examination, and the effect of this ruling on B.'s rights could not be determined. *Held*, that it does not appear that the court below abused its discretion in directing the order of proof, and that this ruling does not entitle B. to a new trial.

*Appeal from Third District, Lewis and Clarke County*

THIS is the second appeal of the action. The first appeal is reported *ante*, 90. The action was tried before WADE, C. J., who

entered judgment on the verdict for Higley, and refused the motion for a new trial.

SANDERS & CULLEN and E. W. & J. K. TOOLE, for appellants.

This court cannot assume to correct or disturb the transcript, or any part which is in the bill of exceptions given by the court below. If the bill of exceptions was not properly before the court, on the motion for a new trial, it embodies the evidence that is legally before the court in passing upon the questions of law involved. More evidence may have been preserved than is necessary, but the proper mode to have remedied this was for the judge who tried the cause to strike it out. This court will not attempt to do so, and thereby prepare a bill of exceptions, when it is the province of another tribunal to amend the same.

The bill of exceptions is a part of the record, and may be used for all the purposes of a statement on appeal, and may explain the applicability of the instructions offered, or competency or incompetency of evidence introduced. 3 Estee's Pl. (2d ed.) 421-425; *Loucks v. Edmondson*, 18 Cal. 203; *Towdy v. Ellis*, 22 id. 650; *Wetherbee v. Carroll*, 33 id. 549; *Berry v. S. F. & N. P. R. Co.*, 47 id. 643.

This court will not entertain for the first time the objection that no copy of what counsel calls "the statement" was served. This objection was not taken or passed upon in the court below, and no exception or appeal was taken thereon. Whether we treat this as a bill of exceptions or statement, the objection is waived by the submission of the motion for a new trial. *Williams v. Gregory*, 9 Cal. 76; *Dickinson v. Van Horn*, id. 207; *Kimball v. Semple*, 31 id. 657; *Morris v. Angle*, 42 id. 236.

The statute gave the court power to extend the time for filing the statement and affidavit. They were filed in time, the rule being to exclude the first day and include the last. Civ. Pr. Act, § 578; Code Civ. Proc., § 519; Sts. 8th Sess. 52, § 14; *Bryan v. Maume*, 28 Cal. 238.

It devolved on respondent to show he was accepted as a passenger, and took his seat as such. There was error in not allowing respondent to be cross-examined upon this point, and allowing respondent to make such proof as rebuttal testimony.

The misconduct and irregularity on the part of respondent's attorney were prejudicial to the appellants' case, and affected their substantial rights. *Chicago Legal News*, Dec. 21, 1878, 111.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for respondent.

The motion for a new trial and affidavits in support thereof were not filed according to law or the order of the court. Code Civ. Proc., § 287. No copy of statement on motion for a new trial was served on respondent or his attorneys. The evidence taken upon the trial was not settled by the judge who tried the cause, and has not been set forth in the manner required by law. The Code of Civil Procedure, passed at the tenth session of the legislative assembly, governs these proceedings.

The bill of exceptions and statement were to be filed by January 20, 1879. They were filed on that date, and cannot be considered by this court. When an act is to be done "by" a given day, or a party has "until" a certain day to perform any thing, the day named must be excluded, and the act must be done on or before the date prior to that specified. *Rankin v. Woodworth*, 3 P. & Watts, 48; *Richardson v. Ford*, 14 Ill. 332; *People v. Walker*, 17 N. Y. 502.

The so-called exception was not reduced to form, or signed by the judge of the court below, until after the motion for a new trial had been overruled, and cannot be considered on this hearing as a statutory bill of exceptions. This court can examine only the judgment-roll. The evidence is not properly before this court.

Respondent waived no rights in the court below. No notice of the motion for a new trial was served on respondent. *Franklin v. Reiner*, 8 Cal. 340; *Harper v. Minor*, 27 id. 107; *Keeran v. Allen*, 33 id. 542.

The point of appellants, relating to irregularity in the argument of counsel, cannot be sustained. The question was not saved properly. The counter affidavits excuse or justify it. No objection was made at the time to the course of counsel. It is not shown by the transcript that respondent's counsel were not replying to comments of appellants' counsel. *Richie v. State*, 59 Ind. 121.

There was no error in refusing to allow appellants to cross-examine respondent. He was not examined concerning any thing that had been testified about on his direct examination. Appellants were trying to make out their defense, and prove the affirmative matter set up in their answer by the cross-examination of respondent before they had opened their case. When respondent was called in rebuttal, he was fully cross-examined as to the same matter by appellant, and appellants could not have been injured.

BLAKE, J. The respondent maintains that the appellant cannot be heard on any errors which do not appear in the judgment-roll. This action was commenced April 24, 1876. The judgment was entered December 23, 1878, and the court below made the following order, December 26, 1878: That the time for preparing, filing and serving the notice of the motion for a new trial, the points in writing specifying the grounds thereof, and all papers pertaining thereto, be extended until January 9, 1879; that the bill of exceptions and statement on said motion "be prepared and filed by" January 20, 1879; and that the appellants "have ten days thereafter to file amendments to said bill of exceptions and statement." The respondent excepted to the action of the court in granting this order. The appellants filed their motion for a new trial January 8, 1878, and some affidavits in support of the same January 20, 1879. The respondent moved to strike from the files the evidence and affidavits filed by the appellants, and objected to the use of any documents on the hearing of the motion for a new trial, which were not contained in the judgment-roll. The motion and objections were overruled by the court. Affidavits were filed afterward by the respondent, and the motion for a new trial was refused April 4, 1879.

The first question raised by counsel relates to the statute which must govern this appeal. We think that the Code of Civil Procedure, approved February 16, 1877, cannot control any question before us. The proviso of the six hundred and seventy-fourth section is as follows: "Provided, that this act shall not be so

construed as to affect any suit or proceeding that may be pending in any court of this Territory at the time this act shall take effect." The following section provides that "this act shall take effect and be in force on and after the first day of August, one thousand eight hundred and seventy-seven," except certain chapters and sections, "which shall take effect and be in force from and after its passage." In moving for a new trial and preparing bills of exceptions, the appellants were required to proceed according to the fourteenth, fifteenth and sixteenth sections of the Civil Practice Act, approved February 13, 1874. In the interpretation of these provisions we follow the decisions of this court in a number of cases. *Taylor v. Holter*, 2 Mon. 476; *Daniels v. Andes I. Co.*, id. 500; *First Nat. Bank v. Irvine*, id. 554. The evidence, which is embodied in the transcript, does not form a part of any bill of exceptions that has been signed by "the judge who tried the cause," and must be disregarded. No motion has been made that this judge be permitted to sign any bill of exceptions in this action, although the attention of the appellants was directed to this subject in the court below. Sts. 8th Sess. 53, § 15. Most of the alleged errors relied on by the appellants cannot be considered by this court for the foregoing reason.

The respondent claims that we cannot examine the affidavits and papers which were filed January 20, 1879, because the appellants did not comply with the order of the court below, which required that the same, or a part thereof, should be filed "by" January 20, 1879. Our attention has not been called to any authorities which determine this inquiry. In *Rankin v. Woodworth*, 3 Penr. & W. (Pa.) 48, it is held that a contract to have a mill "completed by November next," means that it shall be finished before said month of November; and that "when a thing is ordered by a particular day, it is with a view of having the use of it on the day." In *Coonley v. Anderson*, 1 Hill (N. Y.), 519, it is held that a contract to deliver by a certain day, means on or before the day. While some of the cases support the views of the respondent in the construction of the word "by," we have concluded, after an examination of the orders of the court below, that it was the intention to allow the appellants

to include said twentieth day of January, in the period of time within which the bill of exceptions or statement must be filed.

There are two matters for our determination upon this hearing. The appellants insist that their rights were prejudiced by the irregular conduct of the counsel for the respondent in commenting upon subjects which were not in evidence before the jury. It appears from the affidavits that remarks were made during the argument of the case concerning the action of the appellants in increasing their rates for the transportation of passengers between Helena and Butte; that one of the attorneys for the appellants objected at the time to the same; that another attorney for the appellants withdrew the objection; that the court then observed to the jury that they must take no notice of any thing said by the attorneys, which was not in the testimony; that afterward counsel for the respondent referred to the amount of the verdict at the first trial of this action, the reversal of the judgment by this court, the opinion and reasons of this court on the first appeal, and the intention of the appellants to carry the case to the supreme court of the United States, if any decision was rendered against them; and that no other objection was made, and no exception was taken by the appellants to these proceedings. We are of the opinion that the case of *Kinna v. Horn*, 1 Mon. 597, is decisive of this point. Kinna, the appellant, in some affidavits, complained of the conduct of the respondent, and one of his attorneys, but did not save an exception to any action or ruling of the court below thereon. It was held that it did not appear that the irregularities affected the verdict of the jury; that this court, in the absence of proof thereof, could not presume that they had any effect thereon, and that the refusal of the judge who tried the cause to grant the motion for a new trial upon this ground could not be deemed an abuse of discretion. These principles are sustained by the authorities. When an irregularity of this character occurs, the counsel for the aggrieved party should promptly ask the court to correct the same, and, upon the failure to obtain redress, an exception to the ruling or action of the court should be taken and saved. In the case at bar, there is no exception of this nature for us to

review, and we cannot say that the court below abused its discretion in refusing to grant the motion for a new trial. *People v. Torres*, 38 Cal. 141; *Gillooley v. State*, 58 Ind. 182; *Wilkins v. Anderson*, 11 Penn. St. 399; *State v. Comstock*, 20 Kans. 650.

The appellants contend in their written argument that the court erred in not allowing them to cross-examine the respondent upon certain matters, and in permitting the respondent to make proof thereof in rebuttal. The exception relating thereto was properly saved. In the absence of the evidence, we cannot determine the effect of this ruling upon the rights of the parties. If the transcript contains a complete and accurate report of all the testimony upon the trial (and the appellants insist that it does), we have no hesitation in asserting that no injury was done to the appellants, because it appears that the subject was investigated thoroughly and witnesses for all the parties were examined thereon. But we are prohibited by the legal rules which have been referred to, from considering the transcript for this object. It is, however, conceded by the parties that the matters, respecting which the appellants wished to cross-examine the respondent on his direct examination, were introduced in rebuttal. The appellants do not claim that their right of cross-examination was restricted at this stage of the trial, and we can infer that the same was exercised. It is a general rule that the court can direct the order of proof, and the error complained of is, in substance, that this testimony was submitted to the jury at an improper time. It does not appear that the discretion of the court below in this particular was abused. In *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, Mr. Justice STORY says: "The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are, properly, matters belonging to the practice of the circuit courts, with which this court ought not to interfere." In *Johnston v. Jones*, 1 Black, 209, Mr. Justice SWAYNE in the opinion says: "We estimate at its highest value 'the power of cross-examination.' The extent to which it may be carried, touching the merits of the case, was defined by this court in" *Philadelphia & T. R. Co. v. Stimpson*, *supra*. "The rule there laid down, this court has since adhered to. A

cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the cause. The exercise of this discretion by a circuit court cannot be made the subject of review by this court." In *Thornton v. Hook*, 36 Cal. 223, the court says that "a party who has not yet opened his own case cannot be allowed to introduce it by a cross-examination of the witness of his adversary." The court alludes to the difficulty of prescribing the limits to a cross-examination, when both sides of a case are founded upon the same or cognate facts, and says: "Where such are the conditions, the course to be pursued must inevitably be left to the discretion of the judge below, and his ruling cannot be regarded as a legitimate subject for a bill of exceptions." *Elumaker v. Buckley*, 16 S. & R. 72; *Burke v. Miller*, 7 Cush. 547; 1 Greenl. Ev., §§ 445-447. No error appears in this part of the record.

*Judgment affirmed.*

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TERRITORY, appellant, v. Fox, respondent.

**CRIMINAL LAW — burglary — one offense.** An indictment under our statute (Cod. Sts. 218, § 188) must charge but one offense.

Burglary, as defined by our statute (Cod. Sts. 281, § 69), is but of one kind, and has no degrees. To charge any other offense with it in the same indictment is error.

*Appeal from First District, Gallatin County.*

THIS cause was tried in the court below by BLAKE, J.

R. P. VIVION, district-attorney, for appellant.

The indictment, in reality, charges but a single crime, and is in accordance with long-established precedent. *Com. v. Hope*, 22 Pick. 1; *Com. v. Tuck*, 20 id. 356; *State v. Braly*, 14 Vt. 353; 1 Hale's P. C. 560; *State v. More*, 12 N. H. 42; Bishop's Crim. Law, § 687; Roscoe's Crim. Ev. 347-9.

If there are two offenses set forth, the greater includes the less,

and the defendant might be convicted of either. *Breese v. The State*, 12 Ohio, 146; *State v. Wheeler*, 35 Vt. 261.

Section 188, page 218, of Codified Statutes only applies to offenses foreign to each other, where no merger can be had. The present case is one provided for under sections 182-4 of our Codified Statutes, page 218.

The indictment in this case fills all the requirements of the statute, and is in accordance with the decision of this court in the case of *Territory v. Ashby*, 2 Mon. 89.

No brief filed for respondent.

WADE, C. J. This is an indictment for burglary and larceny. The defendant interposed a demurrer, upon the ground that the indictment charged the commission of more than one offense. The demurrer was sustained, and this action of the court below is assigned as error.

The indictment charges two offenses — that of burglary and that of grand larceny.

Our statute provides (Cod. Sts. 218, § 188): "The indictment shall charge but one offense, but it may set forth such offense in different counts." This statute would seem entirely conclusive of the question presented, unless the indictment comes within the operation of those statutes which provide that upon an indictment for an offense consisting of different degrees, the defendant may be found not guilty of the degree charged, and guilty of any degree inferior thereto; or that the defendant may be found guilty of an offense, the commission of which is necessarily included in that with which he is charged in the indictment. Cod. Sts. 218, §§ 182-3.

The prosecutor has submitted an argument based upon the theory that the crime of larceny — in this case grand larceny — is necessarily included in the crime of burglary. It is a sufficient answer to this argument to say, that under our statute there are no degrees in the crime of burglary; that the crime of burglary does not necessarily include any other crime; and that the charge is complete when it is **alleged that the defendant, in the night**

time, did forcibly break and enter the dwelling-house with intent to commit murder, rape, robbery, mayhem, larceny or other felony. It is not necessary that the other felony be committed in order to make complete the crime of burglary. If the building is broken and entered with intent to commit a felony, then burglary is the proper charge. With no better propriety could it be said that larceny is necessarily included in the crime of burglary, than it could be said that murder, rape, robbery or mayhem are necessarily included in such crime. At common law there are two kinds of burglary—first, complicated and mixed with another felony; and, second, simple burglary—for which different punishments were inflicted. Hence, for the first the indictment necessarily comprised two offenses—burglary and such other felony as may have been committed, and the defendant could be acquitted of the burglary, if the case was so on the evidence, and found guilty of the other felony only. *People v. Garnett*, 29 Cal. 626; 1 Hale's P. C. 549. But our statute describes no such offense as burglary complicated or mixed with any other felony, and hence the common-law authorities upon the subject are not applicable to indictments for burglary under our Criminal Code. The judgment is, therefore, affirmed with costs.

*Judgment affirmed.*

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### HERSHFIELD & BRO., appellants, v. AIKEN ET AL., respondents.

**PLEADING**—*fact and conclusion*—*defective pleading cured by answer*. An averment in a complaint in an action to recover on a promissory note, that the amount thereof is "due and payable," states only a conclusion of law, and does not as a fact allege a breach of contract. Such pleading is bad on demurrer. But when there has been an answer over a trial upon the merits in which it was found as fact that the note was not only due but wholly unpaid, and a judgment or decree, the same will not be disturbed for this mere technical defect.

A defective complaint may be cured when the material fact omitted therefrom has been supplied by the answer.

Answering over and going to trial on the merits, ought to be held a waiver of a technical defect in a complaint.

After verdict it will be presumed that the proof on the trial supplied the defect in the pleading.

**AMENDMENT OF PLEADINGS.** Even after judgment leave to amend so that the issue in the pleadings should correspond with the proof should be allowed in furtherance of justice, on terms. Cases of *Wormall v. Reins*, 1 Mon. 630, and *Hartley v. Preston*, 2 id. 415, considered and reaffirmed.

*Appeal from Second District, Deer Lodge County.*

THIS is an appeal from an order of the court below granting a new trial for insufficiency of the complaint. The facts are fully set forth in the judgment.

CHUMASERO & CHADWICK, for appellants.

The complaint alleges a sufficient breach of contract. As to the proper construction of the terms *due* and *owing*, see *Keteltas v. Myers*, 19 N. Y. 231; 7 id. 478; *United States v. Bank of North Carolina*, 6 Pet. 29.

The court will not grant a new trial for an entirely harmless error. Hilliard on New Trials, 32, § 1, and p. 46, §§ 8, 9; *Brazier v. Clap*, 5 Mass. 10.

By answering over and joining issue on the merits, defendant waived his objection to the technical defect in the complaint. *Brown v. Saratoga R. R. Co.*, 18 N. Y. 495; *Aurora City v. West*, 7 Wall. 82; *Hill v. Haskin*, 51 Cal. 175; *Chitty's Pl.* 671; 4 Iowa, 499.

If complaint was defective plaintiffs should have been given leave to amend. *Hartley v. Preston*, 2 Mon. 415; 1 Whittaker's Pr., 32-3.

The defective complaint is cured by the verdict. *Garner v. Marshall*, 9 Cal. 269; Stephen's Pl. 149; *Coryell v. Cain*, 16 Cal. 567; *Thomas v. Roosa*, 7 Johns. 462; 1 Sandf. 228; 7 Term R. 514; *Pangburn v. Ramsay*, 11 Johns. 141; 1 East, 209; *Bank of Utica v. Sneeds*, 3 Cow. 635.

THOS. L. NAPTON and HIRAM KNOWLES, for respondents.

The complaint did not allege a breach of contract. No fact can be proved except as alleged. *Maynard v. F. F. Ins. Co.*, 34 Cal. 48; Moak's Van Santv. Pl. 846; Pomeroy's Remedial Rights, 570-595; *Tevis v. Hicks*, 41 Cal. 123.

The complaint neither set forth copies of the notes nor plead the same according to their legal effect. An exhibit is no part of a complaint. *Los Angeles v. Signoret*, 50 Cal. 298.

Substantial allegations in a complaint are as necessary under the code as at common law. *Miller v. Van Tassel*, 24 Cal. 458.

California decisions should have most weight in this Territory as our code was adopted from that State. *Creighton v. Hershfield*, 2 Mon. 386. For authorities on this case, see *Frisch v. Caler*, 21 Cal. 71; *Doyle v. Phoenix Ins. Co.*, 44 id. 264; *Davanay v. Eggenhoff*, 43 id. 395; *Roberts v. Treadwell*, 50 id. 521; Pom. Leg. Rem. 570.

Pleadings cannot be amended after judgment by inserting material allegations. *Moak's Van Santv.* Pl. 827, 828, 830, 833, 834, 848.

The findings of the referee do not supply the defects of the complaint. The evidence does not justify the decree.

Nothing was due on the crushing contract till completed, it was an entire contract. *Wolf v. House*, 20 N. Y. 197; 2 Pars. on Cont. 519, note.

The money realized from crushing ores above expenses should have been applied to satisfy the notes and mortgage. 2 Pars. on Cont. 631; *Thornycraft v. Crocket*, 16 Sess. 445.

The mortgage requires the application of *all* the proceeds of the mine to the payment of the notes and mortgages, not the *net* proceeds. Courts should construe, not make contracts. *Bradley v. W. A. C. S. P. Co.*, 13 Pet. 98.

The decree in the case is void, it is supported neither by pleadings nor evidence.

WADE, C. J. This is an appeal from an order granting a new trial. Two questions are involved in the solution of the case, viz.: First. Does the complaint state facts sufficient to constitute a cause of action? And, second, if not, was the defect cured by the subsequent pleadings, trial and decree rendered in the case?

The action was instituted to foreclose a mortgage, and it be-

comes necessary, in order to properly understand the questions involved to state some of the facts in the case.

George Plaisted and William Nowlan were partners, and as such owned the Atlantic Cable Quartz Mill. Alexander Aiken and John B. Pearson were the owners of a two-thirds interest in the Atlantic Cable Quartz Lode. Under and by virtue of a certain written contract entered into between Plaisted and Wheelock, and Aiken and Pearson, on the 14th day of October, 1867, which by purchase and assignment became the contract of Plaisted and Nowlan, parties of the first part, and Aiken and Pearson, parties of the second part, the former agreed to construct a quartz mill, and to crush quartz thereat from the Atlantic Cable mine, for the latter, to the amount of ten thousand tons, at an agreed price per ton. In pursuance of this contract, the mill was constructed, and certain quartz crushed, whereby the parties of the second part become indebted to the parties of the first part in the sum of \$40,000, to secure the payment of which they executed to Nowlan their three promissory notes, two for the sum of \$13,500 each, and one for the sum of \$13,000, on the 17th day of July, 1868, together with a mortgage to secure the payment of the same, upon their interest in the Cable mine, \$22,928.<sup>21</sup>/<sub>100</sub> of which indebtedness Plaisted claimed as being due to himself and Nowlan as partner, and as rightfully belonging to their partnership assets, and that Nowlan caused the notes and mortgage to be executed and delivered to himself, in fraud of the rights of his copartner. Subsequently Nowlan assigned these notes and mortgages to the banking firm of Nowlan & Weary, which becoming insolvent, made a general assignment to one Henry Thompson, and thereafter one Daniel C. Corbin, by order of the court, was substituted as such assignee, and with other property received the notes and mortgage aforesaid.

Thereupon Plaisted on the 27th day of September, 1869, commenced an action against Aiken and Pearson, and Nowlan & Weary, and Corbin, to cause these notes and mortgages to the extent of \$22,928.91 to be declared partnership assets of the firm of Nowlan & Weary, and for the foreclosure of the mortgage.

Prior to the commencement of this action, and in the month

of May, 1869, Plaisted had instituted an action against Nowlan & Weary and Corbin for a dissolution of the copartnership between himself and Nowlan, for an accounting between them of all their copartnership dealings, transactions, and property, and for a decree declaring the said notes and mortgage to the extent of \$22,928.91, and interest thereon, partnership assets, which action was on the 20th day of December, 1870, brought to a trial and decree, whereby it was adjudged and decreed that the copartnership be dissolved; that the notes and mortgage of July 17, 1868, to the extent of \$22,928.91, together with other property therein named, be declared partnership assets of the firm of Nowlan & Plaisted; that the transfer and assignment of such notes and mortgage to Nowlan & Weary, and by them to Thompson and Corbin, to the extent of such sum be set aside and held for naught; and that Plaisted be authorized and empowered to enforce the collection of such notes and mortgage in his own name, but for the benefit of Plaisted and Nowlan. In pursuance of this decree, on the 22d day of May, 1871, Plaisted filed his supplemental complaint in the action of September 27, 1869, setting up such adjudication and making the decree a part of such complaint.

The proposition upon which a new trial was granted is, that the complaint and supplemental complaint, so filed in pursuance of such decree, do not sufficiently or properly aver that the promissory notes, upon which the action was instituted, had not been paid. In other words, that there was no sufficient allegation of a breach of contract. The averments of the complaint are that "the plaintiff further shows that on the 17th day of July, 1868, a large sum of money, to wit, the sum of twenty-two thousand nine hundred and twenty-eight dollars and ninety-one cents, became and was due and payable from the said Alexander Aiken and John B. Pearson to this plaintiff and the defendant William Nowlan, as such partners, on account of crushing quartz at their said mill, under and by virtue of the said contract. \* \* \*

The plaintiff further states, on the said 17th day of July, 1868, the said William Nowlan, as he alleges, to secure the payment of the said sum of \$22,928.91, together with interest

thereon at the rate of three per cent per month, the said sum being at that time so due the plaintiff and said defendant Nowlan from said Aiken and Pearson under said contract, and the further sum of \$17,171.09 claimed by said Nowlan to be due to himself from Aiken & Pearson, took certain promissory notes from them and a mortgage upon the two-thirds of said mining property, then owned by said Aiken & Pearson to secure the same, amounting to the sum of forty thousand dollars, which so far as the same relates to the sum of \$22,928.91, the said Nowlan fraudulently took in his own individual name, and which said notes and mortgage were made payable to himself and not to this plaintiff, as in justice and equity and good conscience should have been done, a copy of which mortgage is hereto annexed and marked exhibit "A," and made a part of this complaint.

\* \* \* The plaintiff further states that the whole of said indebtedness, so accruing from said Aiken & Pearson out of crushing the said quartz ore, accrued and is due and owing under and by virtue of the provisions of said contract, and was jointly due and owing to this plaintiff and the said Nowlan. \* \* \* That the said notes and mortgage have long since by the terms thereof become due and payable, and there is due thereon on account of crushing under said contract, the said sum of \$22,928.91, together with interest," etc.

There was a demurrer to the complaint, for the reason, among others, that the complaint did not state facts sufficient to constitute a cause of action, which was overruled. Thereupon the defendant Aiken answered, and among other defenses, admitted the execution of the notes and mortgage described in the complaint, and mortgage thereto annexed, by himself and Pearson, and averred that the same together with all interest thereon had been fully paid to Nowlan, and discharged, long before he knew that Plaisted claimed or had any interest therein. To this answer, Hershfield & Brother, who had been substituted as plaintiffs in the action in the place of Plaisted, filed their replication, in which they denied that the notes had ever been paid.

And thus the issues of the case were formed. There were other issues subordinate to this one growing out of the allega-

tions of the answer; that the execution of the notes was procured by fraud; that their consideration had partially failed; and that Nowlan went into possession of the mine under the mortgage, and extracted therefrom large quantities of gold, which, besides paying the notes, left a large sum belonging to Aiken, for which, as a counter-claim, he asked judgment against Nowlan.

A trial ensued upon the issue as to whether or not the notes had been paid, and the court, after hearing all the evidence, and having referred certain issues to referees to hear the testimony thereon and make their report and findings, and having approved and adopted such report and findings, and having heard all other proof in the case, found as matter of fact as follows: "That said defendants have failed to pay said notes and mortgage, or any part thereof, and the amount named therein is still due. \* \* \* And the court further finds that there is now due to said plaintiffs on said notes and mortgage the sum of \$19,928.45."

Thereupon a decree of foreclosure in favor of plaintiff for such amount was duly rendered.

1. Does the complaint state facts sufficient to constitute a cause of action? The objection is that the averment, "that the notes and mortgage have long since, by the terms thereof, become due and payable," is a mere conclusion of law, and, therefore, that there is no allegation of a breach of the contract sued on. What is the meaning of the allegation, "due and payable?" Judge SWAN, in his Pleadings and Precedents, page 188, says: "It is not only an allegation of title and interest in the subject of the action, but is also an allegation that the claim is a subsisting, existing debt, and unpaid." To the same effect are the decisions of New York. See *Kittalls v. Myers*, 19 N. Y. 231; *Allen & Carpenter v. Patterson*, 7 id. 478. The fact that these cases were under codes providing that, in an action founded upon a promissory note, it shall be sufficient for a party to give a copy of the note, and to state that there is due to him on such instrument from the adverse party a specified sum, does not vitiate their authority as explaining the abstract meaning of the phrase, "due and payable." See, also, *The United States v. North Car. State Bank*, 6 Pet. 29.

Our habit is to follow the decisions of the supreme court of California when applicable, having taken our Code from that State. That court has repeatedly held, in actions upon contracts for the payment of money, that an allegation that the amount of the debt is "due," or "due and payable," is a mere conclusion of law, and does not aver a breach of contract.

In the case of *Frisch v. Caler*, 21 Cal. 75, the court says: "The fact of non-payment is not directly alleged, the allegation being that there is now due, etc., which is a mere conclusion of law, and would not have stood the test of a demurrer." This question was not directly in the case decided, but it has been followed as authority, as a reference to the following cases will show. *Davanay v. Eggenhoff*, 43 Cal. 395; *Doyle v. Phoenix Ins. Co.*, 44 id. 264; *Roberts v. Treadwell*, 50 id. 520. In the last-named case the court says: "The complaint did not allege that the defendant had not paid the indebtedness, for the recovery of which this action was brought. It merely averred that 'the whole thereof was now due.' This defect in the complaint was pointed out by a special demurrer, which was overruled. The insufficiency of the complaint in the respect indicated was adverted to in *Frisch v. Caler*, 21 Cal. 71. Judgment is reversed and cause remanded."

In *Doyle v. Phoenix Ins. Co.*, the court says: "The allegation that the same 'is now due,' may be laid out of the case, inasmuch as that is a conclusion of law merely."

Under these authorities we must hold that the complaint is defective, in not alleging that the notes sued on still remain unpaid, and that no breach of the contract is alleged. But the authorities we have cited, and the ordinary use of language, however, shows that this defect is a mere technicality, and when a defendant has answered a complaint upon a promissory note, which alleged the amount of the indebtedness to be due and payable, by charging that the same had been fully paid and discharged, and a trial had ensued upon the issue as to whether or not the note had been paid, and where, as a matter of necessity, the proof must have covered the omitted or defective averment, after judgment, verdict or decree, we hold, under the provision of the

Code, that pleadings shall be liberally construed, with a view to substantial justice between parties, that such complaint would support such judgment or decree. Litigation must some time come to an end; and where a fair trial has been had upon substantial issues, it ought not to be disturbed for a technicality that did not and could not in any manner affect the substantial rights of the parties.

2. Was the defect in this complaint cured by the subsequent pleadings, trial and decree rendered in the case?

The execution of the notes as described in the complaint and mortgage, when they were given, and for what sums, the rate of interest and when payable, was all admitted by Aiken in his answer.

Some of these admitted facts appear by way of recital in the mortgage, which is made a part of the complaint, but such recitals are to be taken as averments unless objected to by special demurrer. *Winter v. Winter*, 8 Nev. 135. They are not reached by general demurrer. Aiken made no question as to the amount of the notes, the rate of interest they called for or when payable. He confessed that all these things were properly set forth in the complaint and mortgage. He simply raised the issue of payment, and alleged that the notes had been fully paid and discharged. This allegation the plaintiff denied, and the cause went to trial upon this issue. It was a fair and impartial trial upon the only question in the case, and the same testimony was adduced upon either side as if the issue had been presented by the complaint and answer.

A defective complaint may be cured when the material fact omitted therefrom has been supplied by the answer.

Upon this subject Mr. Pomeroy, in his valuable work on Remedies and Remedial Rights, says: "A defective complaint or petition may be supplemented, and substantial issues may thus be presented by the answer itself. When the plaintiff has failed to state material facts so that no cause of action is set forth, but these very facts are supplied by the averments of the answer, the omission is immaterial, and the defect is cured. This rule should properly be confined to the case where the answer affirmatively

alleges the very fact that is missing from the complaint, but it has in some instances been enforced, although the answer simply contained a denial of the necessary fact which should have been averred by the plaintiff." § 579, p. 630. If the averment in the complaint that the notes were "due and payable," is insufficient, the allegation of the answer that they had been fully paid and discharged, ought to raise an issue and cure the defect. The answer alleged in the affirmative, that which the complaint should have contained in the negative, and is within the spirit of the rule indicated, and after verdict or trial and decree, ought to cure the defect in the complaint. Alleging affirmatively in an answer that a note had been fully paid and discharged, ought to cure a mere technicality in a complaint, which substantially though not formally charged that the same was due and unpaid. Such an answer waives the informality and goes to the substance of the issue. Answering over ought to be held a waiver of a technical defect in the complaint, for the defendant might have stood upon his demurrer thereto. But in this case he preferred to answer to the merits, and thereby compelled a trial. His demurrer had been overruled. There was no occasion for the plaintiff to amend. Having forced a trial upon the only issue in the case, and having been defeated, he cannot now say that he was experimenting for a verdict in his favor, and fall back upon his demurrer.

If he compels a trial, when he ought to have stood upon his demurrer, then he must abide the trial, providing the complaint, by the aid of the answer, the trial and the verdict, can be sustained.

If the answer is in substance the same as it would have been if the complaint had not been defective, and a trial ensued, in which the same proof was received in evidence as if the complaint contained no informality, and if, in proving the defective averment, the proof was necessarily the same as if the averment had been perfect, then such defect is cured by the verdict or decision rendered in the cause, for the reason that it must, of necessity, be presumed that the proof supplied the missing averment. Upon this subject Mr. Chitty says: "The second mode by which defects in pleading may be in some cases aided is by intendment

after verdict. The doctrine upon this subject is founded upon the common law, and is independent of statutory enactments. The general principle upon which it depends appears to be, that where there is any defect, imperfection or omission in any pleading, whether in substance or in form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict. The expression, *cured by the verdict*, signifies that the court will, after verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleading, was duly proved at the trial. \* \* \* Wheresoever it may be presumed that any thing must, of necessity, have been given in evidence, the want of mentioning it on the record will not vitiate it after verdict." Chitty's Pleadings (16th Am. ed.), 705; see, also, *Addington v. Allen*, 11 Wend. 375; *Bowie v. Kansas City*, 51 Mo. 454; *Brown v. Saratoga R. R. Co.*, 18 N. Y. 495; *Hill v. Haskin*, 51 Cal. 175; *Manwell v. Manwell*, 14 Vt. 14; *Warren v. Warren*, 7 Greenl. 63; *Garner v. Marshall*, 9 Cal. 269; Stephen's Pl. 149; *Thomas v. Rosa*, 7 Johns. 462; *Byard v. Malcomb*, 2 id. 550; *Pangburn v. Ramsay*, 11 id. 141; *Bank of Utica v. Sneeds*, 3 Cow. 635.

In this case the issue joined necessarily required on the trial proof of the facts defectively stated in the complaint, as to whether the amount of the notes was due and unpaid. In attempting to prove that they were due and payable as alleged, the plaintiffs must have proved that they were due and unpaid, and so the court found. The conclusion is irresistible, that in attempting to prove the facts imperfectly stated, they must have made such proof as would have supported the averment, had it been perfect and complete. Such proof, after verdict or decree, aids the averment and cures the defect. And it does not defeat the efficacy of such proof if, technically speaking, the defective averment was but a conclusion of law. Evidently it was an at-

tempt to state facts, and proof of this character, necessarily given upon a trial of the defective issue, must, in like manner, cure this as well as any other defect. And so we think it may safely be said that, where facts are entirely omitted, but are so connected with the facts alleged that the facts alleged could not be proved without proving those omitted, after verdict, the facts omitted will be presumed to have been proved upon the trial, and a defective complaint, aided by such proof, will support a judgment.

3. There is one other consideration. The issue had been tried. It was the only one there was, or ever could be, in the case. It was tried as if a breach of the contract had been properly alleged. Proof had been introduced, *pro* and *con*, upon the issue. The question had been fairly adjudicated as to whether or not the notes had been paid. After the decree had been entered, and on argument of the motion for a new trial, the plaintiffs moved for leave to amend the complaint, so as to make the issue in the pleadings correspond with the proof, and under the decisions of this court we are unable to see any good reason, even after judgment, why such leave was not granted. See *Hartley v. Preston*, 2 Mon. 415; *Wormall v. Reins*, 1 id. 630.

Admonished by that provision of the Code which declares that the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and that no judgment shall be reversed or affected by reason of such error or defect, and holding that the technical defect in the complaint was, after judgment and decree, cured by the averment of the answer and by the trial that ensued, in which evidence was necessarily heard upon the very fact omitted from the complaint in attempting to prove the facts defectively alleged, and believing that a defective complaint, when so aided, will support a judgment, and seeing no reason why leave was not given to amend the complaint so as to make the issue in the pleadings correspond with that of the proof, we think the court erred in granting a new trial, and the order granting the same is, therefore, set aside, and the cause is remanded, with directions to the court below to allow appellants to amend their complaint and to overrule the motion for a new trial.

*Judgment reversed.*

## TERRITORY, appellant, v. INGERSOLL, respondent.

**RIGHT OF CHALLENGE TO A GRAND JURY.** The right of challenge to the grand jury is a substantial right provided by statute for every one held to answer for an offense which is submitted to the investigation of such jury, and where, from any cause, the accused is deprived of this right without its being waived, expressly or by implication, it is good cause for setting aside an indictment.

J. A. JOHNSTON, district attorney, and E. W. & J. K. TOOLE, for appellant.

The statute provides that no indictment shall be quashed for any defect which does not prejudice the substantial rights of the accused upon the merits. Cod. Sts., 1872, 216, § 171.

Motions of this character are not favored in law. Bishop's Crim. Pr., §§ 452-744; *People v. Jewett*, 3 Wend. 314-321.

The rights of the defendant are fully protected by other provisions of the statute. Cod. Sts., 1872, 221, § 206; *People v. Beatty*, 14 Cal. 567.

The motion should show affirmatively the existence of some cause for challenge provided by statute. 1 Whart., §§ 472-3; Cod. Sts., 1872, 221, § 207.

The complaint on which defendant was held to answer at the November term of the district court was fatally defective in not alleging the date of the commission of the offense. *Com. v. Hutton*, 5 Gray, 89-91; 1 Whart. 264.

He stood in the position of an indifferent third person.

SANDERS & CULLEN and CHUMASERO & CHADWICK, for respondent.

The right of challenge of a grand jury is a substantial right. *People v. Romero*, 18 Cal. 94.

It must be exercised or waived. It has not been exercised or expressly waived. Waiver by implication can take place only when intended, or where the act or omission ought, in equity and justice, to estop the party from insisting on his right. 58 Penn. St. 444.

GALBRAITH, J. This is an appeal from an order by the court below, setting aside the indictment.

The motion to set aside the indictment was made upon several grounds, the principal of which was that the defendant, by the act of the Territory, had not been afforded an opportunity to exercise his right of challenge, as provided by law. Upon this ground the motion was sustained. From this action of the court the appeal is taken.

It appears from the record in this case, that during the March term of the district court, the defendant was arrested and brought before the probate judge, upon the charge of grand larceny, and was held over by recognizance for his appearance at the next, being the November term of the district court, and was thereupon discharged from arrest. At this time the regular grand jury for the March term had been discharged. After said discharge and before the final adjournment of the court at this term, the district attorney appeared and moved the court that by virtue of section 141 of the Criminal Practice Act, the court should make an order directing the clerk to issue a venire to the sheriff, commanding him to summon another grand jury, forthwith to appear at said term, as a contingency contemplated by said section of the statute had arisen. In accordance with this motion the order was made, and said grand jury summoned and impaneled accordingly. Before this grand jury was sworn, the court made the proclamation required by law, notifying all persons held to appear and admitted to bail, to answer for any offense, to then appear and make known their cause of challenge to the jury, or in default thereof, their right would be deemed waived. No one appearing to exercise the right of challenge, the grand jury was duly sworn, entered upon the discharge of its duty and afterward, and during said March term, returned an indictment against the defendant.

The above motion was then made to set aside this indictment, and for the foregoing reasons was sustained.

These reasons more fully set forth were, that defendant having entered into an undertaking before the probate court to appear to answer any indictment which might be presented against him,

*not* at said March term, but at the next, being the November term of said court, and therefore not having been required to be present in court at said March term, and having not, in fact, been present, and not having heard the above proclamation, and having had no actual notice of the impaneling of the grand jury, was therefore by the act of the Territory deprived of his right of challenge.

All of the foregoing facts appear in the record.

The appellant claims that in deciding this case, we are compelled to choose either one or the other horn of the dilemma, that the defendant, in relation to the March term of the district court, was either in the condition of one bound over to appear at that term, or of one subject to indictment, but not held over for his appearance at any term. In the former case the defendant would have been presumed to have had notice of the impaneling of the said grand jury, and was bound to appear and challenge, if he desired to exercise that right. In the other case his only remedy, where the facts warranted such action, would be, that after the finding of the indictment, he might move to set it aside as is provided in section 206 of the Criminal Practice Act. Although we believe that the defendant, by the terms of section 206 of the Criminal Practice Act, and by the provisions of sections 118, 119, 120, of said act, was included in that class of persons, who are held to answer before indictment, yet we do not think that this inquiry is material to the question to be decided in this case.

The main question is, was or was not the defendant, by the act of the Territory, without notice to him, and without his knowledge, deprived of, or did he by such act lose a substantial right? There can be no doubt that the defendant's privilege of exercising his rights of challenge, either to the panel or to the polls of the grand jury, was a substantial right. It is the general American doctrine that where a defendant is deprived of this right of challenge, where it exists, the indictment is worthless, and a conviction thereon would be invalid. The statute provides for the exercise of this right by the defendant, to the grand jury, and it is as much his privilege to insist upon its exercise, in

respect to this body, as afterward upon the trial to challenge the petit jury or the members thereof. We can see no material difference in the character of the right; or its importance to the defendant, between the right of challenge to the grand or the petit jury.

Already the supreme court of this Territory has held that the deprivation of the defendant, of his right to peremptorily challenge the members of the petit jury, was cause for the reversal of a verdict of "guilty." *United States v. Upham*, 2 Mon. 113.

The invoking of the provisions of section 206 of the Criminal Practice Act is in effect an exercise of the right of challenge, and said section is a virtual declaration by the law-making power, of its character as a substantial right. This section provides that an indictment may be set aside for reasons, which by virtue of sections 118, 119, 120 of the Criminal Practice Act, are the subject of challenge to the grand jury, either to the panel or the polls. Certainly the right to exercise a privilege, which the statute itself declares to be ground for setting aside the indictment, when the defendant, by not being held to answer, and therefore, not having had an opportunity to exercise the same, has been deprived thereof, is a substantial right. We are therefore of the opinion that the right of challenge to the grand jury was a substantial right, of which the defendant could not be deprived except by his own act, amounting to an express or implied waiver thereof. *People v. Romero*, 18 Cal. 94.

Now did the Territory by its act, as shown by the record, deprive, or cause the defendant to lose this right? The undertaking by the defendant in the probate court was in effect an agreement that he would appear at the November term of the court and answer any indictment presented against him at that term, or he and his sureties would pay to the Territory the amount named therein. It cannot be successfully argued that because no time was alleged in the complaint for the commission of the offense, that the proceedings in the probate court, and with them said undertaking, were therefore void. It was for defendant alone to take advantage of this defect. By failing so to do, waiving a hearing and giving the undertaking, he waived this objection.

The undertaking was sufficient for the accomplishment of its object, viz.: To compel the appearance of the defendant at the November term, and being in effect an agreement for that purpose, it operated as a notice to him that at that term he must appear and exercise his right of challenge to the grand jury which would find the indictment, to answer which this undertaking was given. Even if the defendant had been held to appear at the March term and the first grand jury therefor had been discharged without finding an indictment against him, we think it doubtful whether or not an indictment, found against him by the second or special grand jury, of the impaneling of which he had no knowledge and no actual notice, would be a valid indictment. Secret tribunals and *ex parte* proceedings, especially in criminal matters, are repugnant to the genius of our institutions. No savor of unfairness should be permitted to taint. No appearance of secrecy should be permitted to cast the faintest suspicion upon the pure character of our legal proceedings, and especially those whose province it is to aid in the determination of questions between government and citizen, where his good name, his liberty, and perhaps his life may be involved. In this case the defendant had no more opportunity to exercise his right of challenge to the grand jury than if he had not been held to answer at all. And having been in fact previously held to answer, was also by the very terms of section 206 of the Criminal Practice Act (which by the terms thereof is only applicable in cases where the defendant has not been held to answer before indictment), effectually prevented from exercising the remedy provided by that section. We think the act of the Territory, as shown by the record, prevented the exercise of the right of challenge by the defendant as effectually as if he had appeared before the grand jury, and had been expressly prohibited from exercising this right.

The defendant was in fact held over to answer before indictment, and is therefore unable to avail himself of the provisions of section 206 of the Criminal Practice Act. He was also, by the act of the Territory, prevented from exercising his right of challenge to the grand jury as provided by sections 118, 119 and 120

of said act. He has therefore been entirely prevented from exercising his right of challenge to the grand jury as provided by law, which in our view is a substantial right.

Therefore the order setting aside the indictment is affirmed with costs.

*Judgment affirmed.*

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VANTILBURG, respondent, v. BLACK, appellant.

**MARRIED WOMAN**—*judgment on her promissory note erroneous, not void—defense of coverture.* W. and his wife R. made a promissory note to B., and executed a mortgage of W.'s real property to secure its payment. R. did not receive any part of the consideration of the note. B. commenced an action on the note and mortgage, and the records of the court show that W. and R. appeared by an attorney, and filed a demurrer, which was overruled. No other defense was made, and a personal judgment was rendered against W. and R., and a deficiency judgment was entered against W. and R. upon the filing of the return of the sheriff, showing that a part of the first judgment remained unpaid after the sale of the mortgaged property. *Held*, that the judgments against R. were erroneous, but not void. *Held, also*, that the coverture of R. would have been a good defense in the action brought by B., but that her failure to plead the same does not affect the judgments against her, which are valid until they are reversed or annulled.

**SAME**—*relief from erroneous judgment—motion after adjournment of term.* R. filed a motion to vacate the judgment against her at the first term of the district court that was held after they had been entered, and the motion was overruled. R. did not appeal from any of these proceedings, or set forth in her complaint any excuse for her neglect so to do, and commenced this action to annul the judgments about sixteen months after the entry of the deficiency judgment. *Held*, that the court did not have jurisdiction to entertain this motion after the adjournment of the term at which the personal judgment was entered. *Held, also*, that R., having failed to use proper diligence in seeking legal remedies, and exercising her statutory right of appeal within a year after the commission of the acts complained of, cannot maintain this action for equitable relief.

**CASE AFFIRMED.** The case of *Boley v. Griswold*, 2 Mon. 447, holding that equity will not afford relief to a party who has been negligent in obtaining a legal remedy, affirmed.

**JURISDICTION**—*pleading of facts affecting jurisdiction of married women.* R. alleged in her complaint in this action that no summons was served upon her in the suit commenced by B., that she did not authorize any attorney to

appear for her, and that she did not file a demurrer therein. B. in his answer denied these allegations, and averred that a summons was served upon R., that she appeared in court and filed a demurrer, and that she had actual knowledge of the judgments at the time the same were entered. The court struck from the complaint and answer these allegations and averments, and rendered judgment on the amended pleadings for R. *Held*, that the court erred in making these amendments to the pleadings, and that these issues were material, and should have been determined before the entry of a judgment in the action.

*Appeal from Third District, Jefferson County.*

THIS action was tried by WADE, C. J., without a jury.

CHUMASERO & CHADWICK, for appellant.

Appellant had a remedy at law. No appeal was taken from the judgment, and she did not attempt to interfere with it until a year after she had notice of the deficiency judgment. *Logan v. Hillegass*, 16 Cal. 200.

Where a married woman fails to interpose the defense of coverture she is estopped from availing herself of such fact after judgment to avoid the levy of an execution. *McDaniel v. Carver*, 40 Ind. 250; *Elson v. O'Dowd*, id. 300; *Wagner v. Ewing*, 44 id. 441; *Freeman on Judgm.*, §§ 502, 503, 506.

A judgment against a married woman is conclusive if not reversed on appeal. A judgment against husband and wife may be satisfied out of the property of either. *Freeman on Judgm.*, § 150; *Gambette v. Brock*, 41 Cal. 83; *Guthrie v. Howard*, 32 Iowa, 54; *Spalding v. Wathen*, 7 Bush, 659.

Judgments against married women cannot be set aside or enjoined without establishing such facts as would entitle the applicant to relief independent of the fact of coverture. *Landers v. Douglass*, 46 Ind. 522; *Green v. Branton*, 1 Dev. Eq. 500. Coverture is a special defense, and must be pleaded. *Johnson v. Miller*, 47 Ind. 376.

Equity will not relieve a party who had a legal remedy and lost it by his negligence. *Imlay v. Carpentier*, 14 Cal. 173; *Mastick v. Thorp*, 29 id. 444.

Our statutes treat a married woman in regard to her separate property as a *femme sole*. It recognizes her absolute ownership

of it. Cod. Sts. 521; *Griswold v. Boley*, 1 Mon. 545; Civ. Pr. Act, § 7.

Appellant could charge her property, and did so by signing the note and mortgage. *Gardner v. Gardner*, 7 Paige, 112; 2 Kent's Com. 164; *Vanderheyden v. Mallory*, 1 N. Y. 452; *Fire Ins. Co. v. Bray*, 4 id. 9; *Major v. Symmes*, 19 Ind. 117; *Grapen-gether v. Fejervary*, 9 Iowa, 163; *Miller v. Newton*, 23 Cal. 554.

The case of *Yale v. Dederer*, 18 N. Y. 265, is overruled in *Todd v. Lee*, 15 Wis. 365.

In conflict with the law laid down in the authorities, the court below amended the pleadings and struck out material issues.

SHOBER & LOWRY, for respondent.

Rosa S. Vantilburg, the respondent, was the wife of William Vantilburg, when she executed the note and mortgage to appellant, and the judgment was entered against her. At common law, the legal existence of the woman is suspended during marriage and the husband and wife are one person. 1 Chitty's Blackstone, § 442. The wife during coverture could not be a party to a promissory note. Story on Prom. Notes, §§ 75, 85. Her contracts are not voidable, but absolutely void. Chitty on Bills, 24, 225; Story on Prom. Notes, § 80; Byles on Bills, 47, 48. At common law, the judgment and note of Mrs. Vantilburg were void.

In Montana, the statutes exempt certain property from seizure on account of the husband's debts. Cod. Sts. 521, § 1. She may sue and be sued under certain circumstances. She may devise and dispose of property. Cod. Sts. 555, § 1. These laws do not make the contracts of the wife, which were not valid at common law, valid. Equity will not enforce against a married woman a promise as a surety, which is void at law. *Yale v. Dederer*, 18 N. Y. 265; S. C., 22 id. 450.

In order to charge the separate estate of a married woman, the intention to do so must be declared in the contract. 2 Kent's Com. 153; *Miller v. Newton*, 23 Cal. 554; *Campbell v. Morrison*, 7 Paige, 157.

Where an unjust judgment has been obtained through accident, mistake or fraud, and the statute provides no remedy by a motion, a court of equity will maintain jurisdiction and render adequate relief. *Bibend v. Kreutz*, 20 Cal. 109. All courts having chancery jurisdiction, have power to set aside a judgment improperly obtained. *People v. Lafarge*, 3 Cal. 130. A party is not confined to his statutory remedy, but may resort to equity for relief against a judgment obtained by fraud or surprise. *Carpentier v. Hart*, 5 Cal. 406; *Wolf v. Van Metre*, 23 Iowa, 397.

There was no authority at common law to render a deficiency judgment against respondent. There is no authority given by the statutes of Montana.

BLAKE, J. This action was brought by the respondents to procure the annulment of a deficiency judgment, which had been entered against Rosa S. Vantilburg, the wife of William Vantilburg, in favor of Leander M. Black, the appellant, and enjoin said Black from collecting the same by execution. The court below struck out parts of the complaint and answer and then rendered judgment for Mrs. Vantilburg on the pleadings.

An examination of the following facts will enable us to understand the questions which must be considered. William Vantilburg borrowed of Black before November 6, 1872, six thousand dollars, and the following promissory note was then executed by the respondents and delivered to Black:

\$6,000. "JEFFERSON COUNTY, M. T., *November 6th*, 1872.

Twelve months after date, I promise to pay to the order of L. M. Black, the sum of six thousand dollars for value received, together with interest thereon at the rate of two per cent per month from date until paid, said interest to be paid monthly.

WILLIAM VANTILBURG.  
ROSA S. VANTILBURG."

A mortgage of the real property of William Vantilburg was executed by the respondents to secure the payment of this note. No part of the consideration was received by Mrs. Vantilburg

or expended upon her separate estate. Black commenced an action January 30, 1874, to foreclose this mortgage, and a decree was rendered February 24, 1874, by which it was adjudged that there was due from the respondents to Black the sum of \$9,613.40; that the mortgaged property should be sold to pay the same; and that a deficiency judgment should be entered against the respondents, if it appeared from the sheriff's return that any sum remained unpaid. The property was sold April 1, 1874, for \$4,000, and the return of the officer showed that there was due to Black the sum of \$5,772.62. The clerk of the court below then entered in vacation a judgment against the respondents for this amount of the deficiency. At the first term of the district court, which was held after the entry of the decree and deficiency judgment, Mrs. Vantilburg filed a motion to set aside the proceedings affecting her rights. The motion was overruled. No appeal was taken by the parties, and this action was commenced August 16, 1875. William Vantilburg does not pray for any relief, and has been made a party to obtain an adjudication of the interests of his wife.

How were the rights of Mrs. Vantilburg affected by the execution of the note and mortgage to Black? The extent of her power in this Territory is determined by the following statutes: "The common law of England, so far as the same is applicable and of a general nature, and not in conflict with special enactments of this Territory, shall be the law and the rule of decision, and shall be considered as of full force until repealed by legislative authority." Cod. Sts. 388. Certain property of a married woman is exempt from the debts and liabilities of her husband. Cod. Sts. 521; *Griswold v. Boley*, 1 Mon. 545; S. C., 20 Wall. 486; *Boley v. Griswold*, 2 Mon. 447. The Civil Practice Act provides that "if a husband and wife be sued together, the wife may defend for her own right." § 8.

One rule, which is applicable to this subject, has been laid down in *Nash v. Mitchell*, 71 N. Y. 204, by Mr. Justice ALLEN: "The disabilities of a married woman are general, and exist at common law. The capabilities are created by statute, and are few in number, and exceptional." Many of these disabilities have been

removed in the States and Territories by legislation which has not been adopted in Montana. The obligation of Mrs. Vantilburg in executing and delivering the note and mortgage to the appellant must be governed by the common law.

The decisions of the supreme court of California concerning this question have been uniform from the case of *Rowe v. Kohle*, 4 Cal. 285, to that of *Drais v. Hogan*, 50 id. 121. In *Simpers v. Sloan*, 5 id. 457, the court held that a married woman has no power to sign in her own name a promissory note, and execute a mortgage to secure its payment. In *Luning v. Brady*, 10 Cal. 265, Thomas Brady and his wife, Josephine Brady, made and delivered to Luning a promissory note, and a mortgage securing its payment. Thomas Brady was discharged from his debts under the law for the relief of insolvent debtors, and afterward, a decree was obtained adjudging that Luning recover from Mrs. Brady the amount due upon the note; that the mortgaged premises be sold; and that Mrs. Brady pay any deficiency after the application of the proceeds of the sale. In the opinion of the court, Mr. Justice FIELD says: "By the common law, a married woman cannot bind herself by contract. \* \* \* The joint and several promissory note of the defendant Brady and his wife was only obligatory as the individual contract of her husband. *Rowe v. Kohle*, 4 Cal. 285. \* \* \* It follows that the decree is erroneous in adjudging a recovery against the defendant Josephine, for the principal and interest of the note, and in directing execution for any deficiency which may remain after the application of the proceeds of the sale of the mortgaged premises." The same views are maintained in *Brown v. Orr*, 29 Cal. 120, and *Belloc v. Davis*, 38 id. 256.

A brief review of some recent cases by the supreme court of Massachusetts may be instructive. In *Athol M. Co. v. Fuller*, 107 Mass. 437, Mrs. Fuller, a married woman, gave her promissory note in payment of one made by her and her husband on account of certain articles intrusted to him by the Athol Manufacturing Company. The court held that Mrs. Fuller was a surety for her husband, without any consideration received by her or any benefit to her separate estate, and that the note was

invalid. Similar opinions are announced in *Williams v. Hayward*, 117 Mass. 532, and *Nourse v. Henshaw*, 123 id. 96. In *Williams v. Hayward*, *supra*, the husband and wife signed the note and secured its payment by a mortgage of her separate real estate in settlement of a judgment recovered against the husband. In *Nourse v. Henshaw*, *supra*, the consideration of the note made by the husband and wife was money loaned to the latter upon an agreement that it should be applied to the use of her husband or his firm. The payment of this note was secured by a mortgage of her real estate, and the question before the court was her liability for what remained unpaid after the foreclosure of the mortgage. After these decisions had been rendered, the legislature of Massachusetts passed an act in 1874 (ch. 184) that enables a married woman to make contracts "in the same manner as if she were sole," and does not require the consideration of her contracts to be for her own benefit. After this law took effect three actions were brought on promissory notes made by the husband and wife in payment of his debts, and no part of the consideration was advanced or expended on her separate property. *Major v. Holmes*, 124 Mass. 108. The court held that the wife was liable under this act, and Chief Justice GRAY said: "Before the statute of 1874 (ch. 184) the female defendant would not have been liable in either of these cases, because contracts could only be made by a married woman in reference to her separate property, business or earnings." No law embracing these provisions has been enacted in this Territory.

The same doctrine prevails in New York. In *Yale v. Dederer*, 22 N. Y. 450, it is held that the contract of a married woman, which was not made in her separate business, or does not relate to her separate property, is void at law, and cannot be enforced in equity against her estate, unless the intention of charging her property is expressed in the contract or implied from its terms. This case has been approved and followed in the State. *Com. Ex. Bank v. Babcock*, 42 N. Y. 614; *Manhattan B. & M. Co. v. Thompson*, 58 id. 80; *Gosman v. Cruger*, 69 id. 87; *Nash v. Mitchell*, *supra*. In the opinion in the last case Mr. Justice ALLEN says: "The law does not authorize the presumption, and

courts cannot assume without evidence, that a simple contract, without any thing on its face to indicate the fact, was made for the benefit of the estate of a married woman."

The propositions which have been discussed are supported by the following authorities: 1 Pars. on Notes and Bills, 78; 2 Kent's Com. (12th ed.) \*164; 2 Story's Eq. Jur., § 1397; 1 Jones on Mort., §§ 106-118; Schouler's Dom. Rel. 75.

Mr. Jones, in his excellent work on Mortgages, considers the liability of a married woman for a deficiency arising upon a foreclosure of the mortgage upon her property, when the lien thereon may be valid in equity, and her note or personal obligation secured may be void, and observes: "Of course in such case, when the remedy has been exhausted against the mortgaged estate, there is no further remedy against her. If, for instance, she borrow money upon a mortgage of her real estate for the accommodation of her husband, and it is paid to him, she is under no liability for any deficiency after the application of the property to the repayment of the loan." § 111. In *Stephen v. Beall*, 22 Wall. 329, Mr. Justice HUNT passes upon the power of a married woman to charge her separate estate with the payment of her husband's debts, or any other liability, and concludes that the subjects of discussion by the courts relate to the manner in which she should exercise this right, and "the requisite evidence of its due execution."

In the case at bar, there is nothing upon the face of the note or mortgage, or in the transcript, to show that Mrs. Vantilburg intended to charge her estate with the payment of the note to Black. On the contrary, the real property of her husband was mortgaged for this purpose, and the answer of Black avers that she had no estate at the time that the note and mortgage were executed. If the appellant was then satisfied that Mrs. Vantilburg had no property in her own right, he could not believe that she intended to render her separate estate liable on account of the note. We entertain no doubt that the entry of the personal and deficiency judgments against Mrs. Vantilburg was erroneous.

What was the effect of the first judgment that was entered against Mrs. Vantilburg? Assuming that the appellant is cor-

rect in claiming that the court below had jurisdiction of the parties and the subject of the action, the validity of the judgment must be inquired into. If it was void, it was in the eyes of the law no judgment, and no execution could be issued legally to collect any part thereof from Mrs. Vantilburg, and no deficiency judgment could be entered properly against her by the clerk of the court below. Freeman on Judgm. (2d ed.), § 117, and cases there cited. We may say further that, if this judgment were void, there was no error in the proceedings of which the appellant complains. The authorities are conflicting upon this question. Mr. Freeman in his treatise on Judgments cites the cases in the courts of Maryland, Massachusetts, Missouri and Pennsylvania, which would decide that the judgments against Mrs. Vantilburg are nullities, and says: "Notwithstanding the decisions to which we have referred, the preponderance of authority is in favor of the rule that a judgment against a married woman is not void; and that when erroneous, because based upon a contract which she was not competent to make, or from any other reason, it is still binding upon her until set aside upon appeal or by some other appropriate method." It must be conceded that the doctrine of the courts of these States is founded upon strong reasons, but we think that the best rule has been followed by a majority of the highest tribunals of the Union.

Mr. Bishop, in his commentaries on the Law of Married Women, remarks: "Judicial proceedings, conducted and entered of record in due form, without fraud, bind the parties to them, whether those parties are capable of binding themselves out of court or not. It is so, for example, where an insane person takes a cause into court. In the words of Lord COKE, 'all acts which he doth in a court of record, either concerning his lands or goods, shall bind himself and all others forever.' *Beverley's case*, 4 Co. 123, b. So it is likewise with a woman under coverture." Vol. 2, § 386. Mr. Bishop refers to the case of *Green v. Branton*, 1 Dev. Eq. 500, in which Mr. Justice RUFFIN says: "Married women are bound by judgments at law as much as other persons, with the single exception of judgments allowed by the fraud of the husband in combination with another." In *Gam*

*bette v. Brock*, 41 Cal. 78, it is held that a judgment entered in the justices' court against a married woman upon a contract made by her during coverture is valid until reversed. The latest decision bearing on this question, which we have examined, is that in *White v. Adams*, 52 Cal. 435. White and his wife executed their joint note and mortgage to secure the payment of money; the mortgage was foreclosed, and a decree in due form was entered upon the failure of the Whites to make a proper defense. The court assert in the opinion that "if the plaintiff here (Mrs. White) intended to rely upon her coverture as a defense, she should have interposed the defense then."

Some general principles respecting this investigation may be found in the following decisions of the supreme court of the United States. In *Elliott v. Peirsol*, 1 Pet. 328, Mr. Justice TRIMBLE says: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities." Chief Justice MARSHALL delivered the opinion in *Ex parte Watkins*, 3 Pet. 193, and said: "The cases are numerous which decide that the judgments of a court of record having general jurisdiction of the subject, although erroneous, are binding till reversed." In *Voorhees v. U. S. Bank*, 10 Pet. 449, it is held that a judgment which remains in force is evidence of the right of a plaintiff to process to execute the judgment, and that the errors of the court in which the judgment has been entered, "however apparent, can be examined only by an appellate power." It is also held in *Cooper v. Reynolds*, 10 Wall. 308, and *Gunn v. Plant*, 94 U. S. 644, that a judgment, which has been duly rendered in a court having jurisdiction, is binding until reversed or set aside, "no matter how irregular it may be as to matters of form."

We are, therefore, led by these authorities to the conclusion that the judgments against Mrs. Vantilburg were erroneous, but not void. The failure to plead her coverture, which was a good defense in the action brought by Black against the respondents upon

the foregoing note and mortgage, was a fatal omission, and these judgments are valid until they are reversed or set aside by appropriate tribunals.

What was the remedy of Mrs. Vantilburg? She alleges in her complaint that she filed a motion, together with affidavits setting forth the facts that have been alluded to, to vacate the judgments, at a term of the district court succeeding that at which the decree had been entered. The court below overruled the motion. This action was proper upon one ground, if no other. After the adjournment of a term a court loses control over the judgments rendered at such term, unless its jurisdiction is saved by some proceedings instituted within the time allowed by law. *Daniels v. Daniels*, 12 Nev. 118; *Bibend v. Kreutz*, 20 Cal. 109; *De Castro v. Richardson*, 25 id. 49.

Under the statute of this Territory Mrs. Vantilburg had the right to appeal from the original judgment within one year after the entry thereof. She did not resort to this remedy, and, about five months after the expiration of this period, commenced this action. When a party neglects to avail himself of a statutory privilege that affords him a full, complete and adequate remedy, he cannot obtain relief in an equitable proceeding of this nature. In *Drais v. Hogan*, *supra*, it appears that a judgment had been entered regularly against a married woman, upon a contract which she could not make legally, that the complaint was "radically defective and wholly insufficient to support that judgment," and that no appeal had been taken therefrom. The court held that an appeal from the judgment would have terminated in favor of the wife, but that her rights were lost by the failure to appeal within the time limited by the statute. The complainant in *Creath v. Sims*, 5 How. (U. S.) 192, sought to be relieved in equity from a judgment entered in a court of law on a promissory note, upon the ground that there was a failure or illegality of the consideration of the note. Mr. Justice DANIEL maintains in the opinion that "no reason is perceived why such a defense should not have been made or attempted," and that a court of equity "will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, there-

fore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice." In the recent case of *Brown v. County of Buena Vista*, 95 U. S. 157, Mr. Justice SWAYNE states that it is well settled that a court of equity has the power to relieve against a judgment in a direct proceeding for this purpose on the ground of fraud, accident or mistake. "But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. In all such cases he must be without fault or negligence. If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fault, is a bar to such relief." These views are sustained by many authorities. *Voorhees v. U. S. Bank*, *supra*; *Sample v. Barnes*, 14 How. (U. S.) 70; *Walker v. Robbins*, *id.* 584; *Tilton v. Cofield*, 93 U. S. 163; Freeman on Judgm. (2d ed.), §§ 485-487, 502-506; 2 Story's Eq. Jur., §§ 894-896, 1571-1575, 1583. We examined some of these questions in *Boley v. Griswold*, *supra*, and held that "a court of equity will not interfere by injunction to restrain a party from executing his judgment, unless the injured party has been prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, from availing himself of the facts in a court of law, which prove it to be against conscience to enforce the judgment."

It is conceded that the court, in which the judgment complained of was entered, had jurisdiction of the subject of the action, and the respondent, William Vantilburg, and we have assumed in these inquiries what the papers in that case show, that jurisdiction had been obtained of Mrs. Vantilburg. It appears therein that a proper summons was served regularly upon her; that she and her husband appeared in court by an attorney who filed a demurrer; that the demurrer was overruled; that no further defense was made; and that the judgment was thereafter duly entered. But Mrs. Vantilburg alleges in the complaint in this action that no summons or other process in the original case was

ever served upon her, that she never appeared in court or authorized any attorney to act in her behalf, and that she had no notice or knowledge of this judgment until about five months after its entry. The answer of Black denied the averments, and stated affirmatively the facts to the contrary. On the motion of the respondents, the court below struck these denials and allegations from the answer, because they were redundant and irrelevant. The complaint was then amended on the motion of the appellant, and a judgment was rendered upon the pleadings in favor of Mrs. Vantilburg, and the personal and deficiency judgments against her were annulled. We think that the court erred in granting the motion of the respondents and thereby failed to submit for trial material issues. If these allegations of the complaint are established, Mrs. Vantilburg shows a sufficient excuse for her neglect to defend in the first action. If, however, the allegations of the answer are proved, the judgments against Mrs. Vantilburg cannot be affected by this action. These issues should be tried "after full opportunity has been given to those who seek to sustain, as well as to those who seek to avoid, the judgment." Freeman on Judgments (2d ed.), § 495. We might enforce the principles which have been stated, and adjudge that this action be dismissed on account of the failure of Mrs. Vantilburg to appeal from the judgment after she had been informed concerning its entry. But after a review of the facts before us, we have concluded that it would not be proper to exercise our discretion in this manner.

It is, therefore, ordered and adjudged that the judgment of the court below be reversed with costs, and that this action be remanded for a new trial in conformity to this opinion.

*Judgment reversed.*

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1880.

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Present :

Hon. DECIUS S. WADE, CHIEF JUSTICE.  
Hon. WILLIAM J. GALBRAITH, } JUSTICES.  
Hon. EVERTON J. CONGER, }

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LARGEY, respondent, *v.* SEDMAN, appellant.

**PRACTICE** — *appeal from part of judgment.* This action was brought to foreclose a mortgage executed by A. and B., and the judgment authorized the sale of the property of A. and B., and was adverse to C., who claimed an interest in the property. A. and B. did not appeal, and C. appealed from the judgment affecting his rights. *Held*, that C.'s appeal had been properly taken.

**CASES affirmed.** The cases of *Allport v. Kelley*, 2 Mon. 343, and *Chumasero v. Vial*, ante, 376, holding that this court will not review the evidence to determine questions of fact, when there is no motion for a new trial, and that the judgment will be allowed to stand if it does not conflict with the findings, affirmed.

**FORECLOSURE OF MORTGAGE** — *description of property — section.* The mortgage, which was a part of the complaint, embraced the "property owned by the Montana Flume and Mining Company ; said property is located at and near

the mouth of Alder gulch in section ten (10), township six (6), south of range four (4), west." At the trial it was proved that the property of said company was located in sections ten, eleven, thirteen and fourteen of said township, and the judgment authorized a sale of the same. *Held*, that the only property that could be sold under the mortgage was included in said section ten.

*INTERPRETATION of mortgage by the parties.* The condition of the foregoing mortgage provided that, upon the payment by A. and B. of \$16,000 and interest at certain times, according to the tenor of a certain promissory note, and upon the payment by A. and B., upon said \$16,000, of the sum of \$4,000 at certain times, said mortgage and note should be void. The complaint and answer of C. treated the mortgage as security for the payment of the note for \$16,000. A. and B. did not appear in the action. The complaint alleged that A. and B. had paid on said note over \$12,000, and C. averred in his answer that A. and B. had paid thereon over \$23,000. C. contended that the note for \$16,000 was a penalty to secure the payment of \$4,000. *Held*, that the parties had interpreted the contract by their acts, that the note and mortgage were security for the payment of \$16,000, and that this interpretation was binding upon C.

*Appeal from First District, Madison County.*

THIS action was tried by BLAKE, J.

SANDERS & CULLEN, for appellant.

The call of the mortgage is not and does not purport to be a conveyance of the undivided half of all of the property of the Montana Flume and M. Co. It might as well be contended that it would convey an interest in the property of the company outside the county named, or this Territory, as outside of the particular section, town and range named. The call of the mortgage is clear and specific, and no evidence was offered and none would be admissible to explain or qualify it in any manner. 3 Washb. Real. Prop. 404, 631.

The call of the mortgage shows the boundaries within which the property is situated, and it is not competent to control them by parol evidence and show that the parties supposed other property to be included in addition to what is embraced within the bounds named. 3 Washb. Real Prop. 424, 636.

Where the description in a deed is in general terms and is then followed by a reference to one that is specific and particular, as in this case, the latter limits and controls the former. 3 Washb. Real Prop. 400, 630; *Barton v. Dawes*, 10 C. B. 261.

The attempted conveyance by Griffith and Thompson of one-half of the property of the Montana Flume and Mining Company was void and no right of action could arise by reason of it. 3 Washb. Real Prop. 329, 348.

This suit is not brought to reform the mortgage. There is no allegation that property outside of section 10 was intended to be conveyed, and, in this respect, the complaint does not sustain the decree.

By the last provision of the mortgage, it appears that it was a mortgage for \$4,000, with a penalty of \$16,000 to enforce the payment of \$2,000 in one year, and another \$2,000 in two years. Courts always incline, even against express stipulations, to regard penalties as unliquidated damages, and grant what is lawful damages for non-payment of money. 2 Chitty on Cont. 1314, 1320, 1321; *Kemble v. Farren*, 6 Bing. 141; *Astley v. Weldon*, 2 B. & P. 346.

This case shows nearly all of \$4,000 was paid inside of two years. Courts will interpose in such cases by giving decree for balance and interest, and will not permit penalty to attach as unliquidated damages. *Shute v. Taylor*, 5 Metc. 61.

E. W. & J. K. TOOLE, for respondent.

The appeal is from a part of the judgment only. The appeal should have been from the whole judgment. Two of the defendants are in default, and appellant is in no situation to change the decree to affect them without appealing from the whole of the decree. A reversal of the decree would affect the rights of parties who submit to the judgment.

This court must assume, without a motion for a new trial, that all the facts which were necessary to support the findings and decree were established by the evidence. It is a general rule that oral testimony is inadmissible to vary or change the calls in a deed or mortgage, but this has no application here. Both parties claim title from a common source. The same piece of ground is described by different calls, and the court will assume that all the necessary proofs to apply the mortgage and description in the patent to the subject-matter were introduced.

Appellant entered under the mortgage and holds subject to it.

He cannot make his possession the basis upon which to contest the right of the party under whom he entered.

The replication avers that the property in the patent and that known as section 10 before the patent were identical. It is presumed that the proof supported the issues on behalf of respondent.

WADE, C. J. 1. This is an appeal from a decree of foreclosure. The defendants Griffith and Thompson made default. The cause was tried to the court and findings of fact made upon the issue joined by the defendant Sedman. Objection is made to Sedman's appeal for the reason alleged that the same is taken from a part of the judgment and that appellate courts will not review judgments by piecemeal. We have already decided in *Barkley v. Logan*, 2 Mon. 296, and *Plaisted v. Nowlan*, id. 359, that an appeal from a part of a judgment cannot be entertained. The judgment and decree authorizes the sale of certain real estate. The appeal is "from the whole of said judgment against appellant for costs of suit, and from the whole of said judgment and decree affecting the interest of appellant in and to said property;" that is to the property named in the decree. Sedman, claiming an interest in the real estate in question, contested the right of respondents to have the same sold under their mortgage. The only issue tried in the case had relation to his interest in the property and the judgment rendered was adverse to him. His appeal therefore is equivalent to, and is an appeal from, the whole judgment and decree, and does not come within the principle laid down in *Barkley v. Logan* and *Plaisted v. Nowlan*.

2. There was no motion for a new trial and no appeal from an order granting or refusing such motion. This being the case we cannot look into the testimony to examine any question of fact therein contained. The facts found by the court on the trial must be taken as true, for on this appeal from the judgment, we cannot inquire into the insufficiency of the evidence to support the findings. Neither can we review the testimony and make proper findings.

In order to bring questions of fact before this court there must have been a motion for a new trial and an appeal from an

order granting or refusing the same. Statements on appeal are intended solely for the purpose of bringing up alleged errors of law.

The testimony not being properly before the court, we shall have to dismiss many of the questions argued in appellants' brief as not applicable to the case, and the judgment will be allowed to stand, if the same is supported by the findings, and is not in absolute conflict therewith, and is warranted by the complaint. *Allport v. Kelley*, 2 Mon. 343, and cases cited; *Chumasero v. Vial*, ante, 376, and cases cited.

3. The judgment and finding, if in favor of the plaintiff, ought to be supported and authorized by the averments of the complaint; and if in favor of the defendant, by those of the answer; and whether the complaint or answer supports the judgment and decree is a proper subject of inquiry on this appeal and could be raised for the first time in this court. *Territory ex rel. Blake v. Virginia Road Company*, 2 Mon. 96.

The description of the property in controversy as contained in the mortgage which is attached to and made a part of the complaint is as follows: "The undivided half of the mining ground, water rights, ditches, flumes, sluices, mining tools and machinery, and other property owned by the Montana Flume and Mining Company; said property is located at and near the mouth of Alder gulch in section ten (10), township six (6), south of range four (4), west county aforesaid."

The court below, evidently holding, by virtue of this description, that the mortgage covered all the property of the Montana Flume and Mining Company located at and near the mouth of Alder gulch, and that the mortgage was not limited to the property of such company, situated in section ten, township six, found that the mortgage covered not only the property of such company situated in section ten, township six, but also all the property of the company situated in sections eleven, thirteen and fourteen, township six, and entered a decree in pursuance of such finding for the sale of all such property situated in the sections aforesaid.

In other words the court held that the general description contained in these words "the undivided half of the mining ground,

water rights, water ditches, flumes, sluices, tools and machinery and other property owned by the Montana Flume and Mining Company," controlled the particular description that "said property is located at and near the mouth of Alder gulch in section ten, township six, south of range four west," and, therefore, that the mortgage covered all the property of the company located at and near the mouth of Alder gulch whether situated in section ten, township six, or in other sections or townships. In this we think the court erred. The first description is general and indefinite, it does not assume to include *all* the property of the Montana Flume and Mining Company at or near the mouth of Alder gulch. If not, what part of such property is included? The "other property" owned by the company is not pointed out or in any manner named or designated. It might, so far as this description is concerned, be located in some other county, State or Territory, and there is no means of determining whether this other property is real or personal property. The second description carefully locates the property conveyed as "near the mouth of Alder gulch in section ten, township six," leaving no doubt as to what property was intended to be included in the mortgage.

Where an indefinite general description is followed by a definite particular description the particular description must control. 3 Washb. Real Prop. (3d ed.) 345-7; *Smith v. Strong*, 14 Pick. 128; *Barney v. Miller*, 18 Iowa, 460; *Dana v. Middlesex Bank*, 10 Metc. 250.

Only the property of the company situated in section ten, township six, is embraced in the mortgage. Therefore, the decree authorizing and ordering the sale of the property of the company located in sections eleven, thirteen and fourteen, township six is not supported by the complaint, was not authorized by the mortgage and is a mere nullity.

We cannot assume in order to sustain the findings of the court that the proof showed that the parties intended by the conveyance to mortgage the property of the company situate in sections eleven, thirteen, and fourteen, for evidence of such intention, outside of and beyond what is contained in the mortgage itself would have been wholly incompetent. Neither can we assume

in the absence of evidence that the description in the title of the defendant Sedman from Griffith and Thompson is the same as that contained in the mortgage to respondents and therefore that Sedman cannot dispute their title. Such a question could only be raised by testimony showing the fact, and presented to the court in such a manner as would authorize us to examine it.

4. The condition of the mortgage is as follows: "Provided that if the said Griffith and Thompson or their heirs and assigns shall well and truly pay unto said E. Creighton, J. A. Creighton, P. A. Largey or their heirs and assigns the sum of sixteen thousand dollars in two years from the date hereof with interest at the rate of one per centum per month payable quarterly until paid according to the tenor of a certain promissory note of even date herewith, whereby said Griffith and Thompson promise to pay E. Creighton and Company or order sixteen thousand dollars and said interest in two years after date, interest payable quarterly; and provided further that said Griffith and Thompson shall pay unto said E. Creighton and Company two thousand dollars upon said principal sum in one year from the date hereof and two thousand dollars upon said principal sum in two years from the date hereof, then said promissory note and this conveyance shall be null and void, otherwise to be and remain in full force and effect."

Upon the principle, that if the instrument provides that a larger sum shall be paid on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty, the appellants say that this is a mortgage for \$4,000 with a penalty of \$16,000 to enforce the payment of \$2,000 in one year, and \$2,000 in two years, and that no greater sum than \$4,000 and interest can be collected on the note and mortgage.

Mr. Sedgwick in his work on Measure of Damages lays down in substance the following principle to aid in the solution of the question whether the sum named in the instrument was intended as a penalty or as liquidated damages:

*First.* That the language of the agreement is not conclusive and that the effort of the tribunal will be to get at the true intent and meaning of the parties and to do justice between them.

*Second.* That when the agreement is in the alternative to do some particular thing or pay a given sum of money, the court will hold the party failing to have had his election and compel him to pay the money.

*Third.* That in case of an agreement to do some act, and upon failure to pay a sum of money, the court will look into the intent of the parties; that no particular phraseology will be held to govern absolutely; but that although the term "liquidated damages" will not be conclusive, the phrase "penalty" is generally so, unless controlled by some other very strong considerations.

*Fourth.* That whenever the sum stipulated is to be paid on the non-payment of a less sum made payable by the same instrument, it will always be held a penalty.

*Fifth.* Where independently of the stipulation the damages would be wholly uncertain and incapable or very difficult of being ascertained there the damages will usually be considered liquidated if they are so denominated in the instrument. Sedgwick Meas. Dam. (5th ed.), § 479.

It will be seen from these principles and an examination of the cases from which they were deduced that agreements of this character, like any other, should be so interpreted and construed as to arrive at the true intent and meaning of the parties, and that it is the tendency and preference of the law to apportion the damages to the loss actually sustained and hence to regard a sum stated to be payable if a contract is not fulfilled as a penalty and not as liquidated damages.

On this appeal from the judgment, the pleadings are properly before us, and in arriving at the intention of the parties we have the right to look at the interpretation they have put upon the agreement contained in the mortgage as shown by the allegations of the complaint and answer. It appears by the averments of the complaint that the mortgagors treated the conveyance as a mortgage to secure the payment of a note for \$16,000 and not as security for the payment of \$4,000, and that the mortgagors paid more than \$12,000 thereon. This is all admitted by Griffith and Thompson by their default, and it is admitted in the answer of Sedman, and it is therein averred that Griffith and Thompson

paid on said note and mortgage the sum of \$23,858. The parties then have interpreted the contract for themselves and it is not for Sedman, a mere stranger, to say that they have made a mistake and that they did not know what they intended by their agreement, and the payments thereon.

By the payments made and received as shown by the admissions contained in the pleadings, the parties to the transaction treated the note and mortgage as valid security for the payment of \$16,000, and the parties having so interpreted the contract, such interpretation conclusively shows their intention in the premises. A part performance of the contract, a partial payment of the note by Griffith and Thompson is decisive against their right or that of Sedman to say that the note for \$16,000 was merely a penalty to secure the payment of the \$4,000.

It is, therefore, ordered that the judgment and decree be so modified as to authorize the sale of only so much of the property of the mortgagors as is contained in section ten (10), township six (6), and that in all other respects the judgment and decree be and the same is hereby affirmed.

And it is further ordered that the costs of this appeal be paid by the respondents.

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STORY, respondent, v. MACLAY, appellant.

**EVIDENCE** — *expert in freighting business.* A. brought this action against B. to recover an account for transporting merchandise by his ox train from Fort Peck to the old Crow Agency. Upon the trial, A. testified concerning the reasonable value of this transportation. The transcript does not show that A. had any knowledge of the freighting business, or the rates usually charged therein, or the topography of the country between Fort Peck and the Crow Agency, or any other fact that would qualify him to testify as an expert. *Held*, that A. was not a competent witness to give an opinion upon this question.

**SAME** — *competent witness to draw map.* Upon the trial, A. prepared a sketch of the country including Fort Peck, Fort Belknap and the Crow Agency and explained the same to the jury. The transcript does not show that the sketch was correct, or that A. had any knowledge of this region, and the sketch was not authenticated. *Held*, that the sketch was not competent evidence.

**PRACTICE** — *judgment for counter-claim.* The answer of B. set up a counter-

claim for \$1,130, which was admitted by A. in his replication. The jury returned a verdict for \$2,109. *Held*, that a judgment should have been entered for A. for the difference between these sums, or B. should have had a judgment for the amount of his counter-claim.

*Appeal from First District, Gallatin County.*

THE action was tried by a jury, BLAKE, J.

SANDERS & CULLEN, for appellant.

It was error to permit respondent to draw the map and present it to the jury. Respondent was not a competent witness to testify respecting the value of freight from Fort Peck to the old Crow Agency.

Appellants were entitled to a credit on the judgment for \$1,130. They set this up as work done in full satisfaction of respondent's claim, yet if they fail to prove the last fact, they are not to be deprived of pay for the work. The pleadings do not deny the performance of this work, or its value. The verdict is for the full amount without any deduction.

It was error to refuse to give appellants pay for their services on their failure to prove that the services were to be paid for in a particular way.

E. W. & J. K. TOOLE, for respondent.

The only issue is whether the services rendered by appellants were done under the agreement set up in the answer, that appellants should transport the freight mentioned for respondent. The complaint sets up the value of the services and seeks to recover on account of them. Appellants, to defeat a recovery upon the implied contract sued on set up a special agreement, and do not set up any off-set or counter-claim, except such as is denied. It operated simply as a denial of respondent's allegations. The verdict and judgment for respondent established two things: 1. That respondent rendered the services at the special instance of appellants, and that they were reasonably worth the amount claimed. 2. That no such special agreement as that set up in the answer existed. *Murphy v. Napa County*, 20 Cal. 497.

There was no motion for a new trial, and this court will assume under the issues that no set-off existed, and that there was no evidence to support any such claim.

WADE, C. J. This is an appeal from a judgment rendered on a verdict in favor of the respondent, and against the appellants on an account for hauling and transporting about 46,000 pounds of merchandise from Milk river to the old Crow Agency and Bozeman, Montana.

The complaint alleged that so transporting such freight was reasonably worth five cents per pound. On the trial the respondent was called as a witness and testified in his own behalf as follows:

"I have known defendants ten years. My ox train in the fall was at Bozeman, and in October or November, 1874, went to Fort Peck, on the Missouri river, about five hundred miles from here, to fill a contract of Babcock's. Nelson Sill was the wagon-master of the train in my employ." Whereupon the plaintiff's counsel asked witness: "State what it was reasonably worth in the fall and winter of 1874 to transport freight from Fort Peck to the old Crow Agency?" To which question the defendants then and there objected on the grounds of incompetency, which objection was overruled by the court, to which ruling the defendants then and there excepted and the witness answered as follows: "The value of freight at that time was in the neighborhood of from six to ten cents per pound. This was the worst season of the year. At the most favorable part of the year freight between those points was reasonably worth five cents per pound. To my best knowledge a train had never been over the road before." "And plaintiff's counsel then asked the witness to draw a map of the country, including Fort Peck, Fort Belknap and the Crow Agency, and explain the same to the jury (the said region covering an extent of country three or four hundred miles square) to which defendants then and there objected as being incompetent, and because it had not been shown that the witness was a draughtsman, surveyor or otherwise qualified and that the general and official maps of the Territory were alone competent, if any, which objection was overruled and the defendants excepted.

The witness performed and presented a sketch or plat of the region, and defendants objected to the same being presented to the jury or explained by witness, which objection was overruled and witness permitted to explain and show the same to the jury, to which decision of the court the defendants then and there excepted."

1. Was it competent for the witness to give his opinion as to what it was reasonably worth to transport the freight named, and was it competent for him to draw and exhibit to the jury a map of the country mentioned in his testimony?

In the absence of railroads the transportation of merchandise by wagon trains, into and from place to place in Montana becomes a specialty — a distinctive trade or business, having its mysteries and secrets which can only be learned and understood by practical experience and observation. What it costs to outfit a wagon train for freighting; the expense of maintaining such train by the day, week or month; and the amount of freight it can transport, are matters entirely unknown, saving only to those experienced in the trade or business or who have made the subject a matter of particular investigation. And in estimating what it is reasonably worth to transport merchandise from one place to another, it would be necessary to take into consideration the topography of the country between the two places, the condition of the roads, the mountains to pass, the streams to bridge or ford, the length of time required for the journey, the cost of the wagons, animals, harness, tools and accoutrements making up the train, the wear and tear of the same, the daily expense necessarily attending the train, the number of men necessary to employ, their wages and the cost of their support.

Such information, though not scientific or abstruse, would be necessary in order to enable a witness to give his opinion as to the reasonable value of transporting freight from one place to another by wagon trains. Nor is it necessary that a specialty to enable one of its practitioners to be examined as an expert should involve abstruse scientific conditions. 1 Whart. on Ev., § 444. Knowledge of a similar character to that which would authorize an expert to give his opinion as to the reasonable value of trans-

porting freight by railroad train would authorize a witness to give his opinion as to the reasonable value of transporting freight by a wagon train, and we do not see why it would not require an expert in either case, for in each case a witness would be compelled to call to his aid a special particular knowledge of the business, and in the absence of such knowledge his opinion would be wholly incompetent.

The record does not show that the witness was competent to give his opinion as an expert. There was no preliminary examination to ascertain whether he was qualified to express an opinion upon the subject of the inquiry. It does not appear that he had any knowledge whatever of the freighting business, or of the rates usually charged per pound for transporting merchandise. It was not shown that he knew any facts or had any knowledge that would qualify him to speak as an expert. His opinion was therefore incompetent testimony upon a material issue and its admission in evidence error.

2. Neither is there any thing in the record to show that the witness was in any way qualified to make a map of the country including Fort Peck, Fort Belknap and the Crow Agency, being a region of country between three and four hundred miles square. It does not appear that the witness had ever been over the country, or that he had any knowledge whatever in relation to it, or that his map was in any respect correct.

A map or plat in order to become competent evidence to go before a jury must be made by one having the requisite knowledge and properly authenticated. *Smith v. Strong*, 14 Pick. 133; *Gates v. Kieff et al.*, 7 Cal. 124; *Chirac v. Reinecker*, 2 Pet. (U. S.) 613; *Jackson v. Ten Eyck*, 5 Cow. 346; *Wilder v. The City of St. Paul*, 12 Minn. 192; *Bearce v. Jackson, Admr.*, 4 Mass. 408; 2 Phillips' Ev. 254; 1 Greenl. Ev. 161; 1 Whart. Ev., § 668.

The witness did not have knowledge sufficient to qualify him to make the map in question, and the same not being authenticated in any manner, was improperly exhibited to the jury and received in evidence.

3. The defendants in their answer set up a counter-claim amounting to \$1,130.40, which the plaintiff in his replication

admitted. Being admitted in the pleadings this counter-claim formed no part of the issue submitted to the jury. The jury returned a verdict for the plaintiff for the sum of \$2,109.98. Whereupon the defendants moved the court to deduct from the verdict the amount of their counter-claim and render judgment in favor of the plaintiff for the balance, but the court overruled the motion, and this action is assigned as error.

We can see no reason why the amount of the counter-claim, admitted by the plaintiff to be due and owing by him to the defendants, should not have been applied upon the verdict and a judgment rendered in favor of the plaintiff and against the defendants for the difference. Either this application should have been made or the defendants should have had a judgment against the plaintiff for the amount of their counter-claim.

We think the amount of the counter-claim should have been deducted from the verdict and a judgment rendered in favor of the plaintiff for the balance. If this were the only error in the case the judgment might be so modified as to correct it, but the matters discussed in subdivisions one and two render it necessary that a new trial be had.

The judgment is therefore reversed and the cause remanded for a new trial.

*Judgment reversed.*

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STAFFORD, respondent, v. HORNBUCKLE ET AL., appellants.

DECREE — *presumption of validity.* A decree of the district court will be presumed to be supported by every thing necessary to its validity until the contrary appears by averment and proof.

EVIDENCE — *effect of immaterial testimony.* A judgment will not be reversed because of the admission even of improper testimony when it is clear that it involves no injury to the party appealing.

CONSTRUING a court decree. By a former decree of court rendered in the case of *Gallagher et al. v. Bacey et al.*, 1 Mon. 457, and 20 Wall. 670, the plaintiff in this action was decreed entitled to 35 inches of water at the head of his ditch, and then to make good this amount it required that defendants should allow 125 inches of water to flow past the head of their ditch.

*Held*, that the plaintiff by this decree was entitled to the full amount of 125 inches of water at the head of defendant's ditch, and that if by any means he could save it from waste or sinking, he was entitled to the benefits thereof, and that defendants had no cause or right to complain.

**ESTOPPEL — deed — silence — fraud.** When there is no estoppel pleaded and no fraud alleged, the deed must speak for itself; mere silence does not work an estoppel, in absence of fraud. *Griswold v. Boley*, Mon. 560.

**EVIDENCE — oral declarations — rebuttal.** When title is attempted to be proved by oral declarations of the grantors, it may be shown in rebuttal that those grantors made different and contradictory statements, and this is not in conflict with the rule that declarations of grantor in disparagement of his title are inadmissible.

It is not such an error as to warrant a reversal of a judgment because evidence was allowed on in rebuttal which should have been given in chief, when an opportunity was given by the court to produce testimony in contradiction.

**ASSIGNMENT of errors.** An assignment of error will be disregarded that does not specify particularly and clearly wherein the evidence fails to support the verdict.

**INSTRUCTIONS explained.** One of the instructions complained of was in these words: "If it is admitted in the pleadings or proved to your satisfaction that the legal title to this water is in the plaintiff, the defendants to maintain their defense must show their equitable title, and that the plaintiff is trustee for them, by a preponderance of evidence." Such an instruction was proper to inform the jury that the same quantity of proof was necessary to establish the equitable title of defendants whether the legal title of plaintiff was admitted or proved, it was not leaving to the jury to say what was admitted by the pleadings.

### *Appeal from Third District, Meagher County.*

CHUMASERO & CHADWICK, and SHOBER & LOWRY, for appellants.

Plaintiff, by the decree in case of *Gallagher et al. v. Basey et al.*, was only entitled to 35 inches of water at any point above the head of the ditch — any other construction would render the decree void for uncertainty. A decree can only declare facts put in issue by pleadings. *Stewart v. F. & M. Bank*, 19 Johns. 505. There was no separate claim by Stafford. *Wharton on Ev.* 838; *Bliss v. Nichols*, 12 Allen, 443; *Cook v. Barr*, 44 N. Y. 156.

It was competent to show what was said by Stafford at the time he conveyed his interest. *Ming v. Woolfolk*, ante, 380.

The evidence of Rotwitt, Toombs *et al.* was not proper rebuttal.

Any evidence that the 35 inches of water in controversy was the property of the Avalanche Ditch Co. should have been admitted.

What was admitted by the pleadings was for the construction of the court and not within the province of the jury.

E. W. & J. K. TOOLE, for respondent.

The decree in the former suit settled the rights of all parties. It was accepted by all parties. The pleadings admit respondent's title, and the only question at issue is whether he ever divested himself of such title to the appellants or their predecessors in interest. Respondent's individual right was expressly reserved in the deed.

Appellants seeking to establish equitable title by oral evidence, testimony of the same kind is good in rebuttal.

Appellants' appropriation was really only what was in excess of 125 inches, it being established that such an amount was necessary to make 35 inches at the head of respondent's ditch. Respondent is entitled to save this waste for his own use, if possible.

Respondent cites the following authorities: *Drake v. Duvenick*, 45 Cal. 461; 15 id. 263; 14 Peters, 448; 46 Cal. 234; 6 Otto, 547; 52 N. Y. 191; *Kidd v. Laird*, 15 Cal. 161-182.

WADE, C. J. On the 11th day of July, 1871, in an action pending in the district court of Meagher county wherein these defendants and another were plaintiffs, and this plaintiff and others were defendants, the plaintiff herein was adjudged entitled to the use and enjoyment of certain waters of a stream in said county known as Avalanche creek. [1 Mon. 457, *Gallagher et al. v. Basey et al.*, and id. 20 Wall. 670] and the complaint herein charges a wrongful diversion of said waters by the defendants, to the injury and damage of the plaintiff, and prays for an injunction and a judgment for the damages so sustained.

The defendants in their answer among other things admit the rendition of the decree in the case named adjudging and decreeing to the plaintiff the aforesaid water, but aver that the same was so rendered in favor of the plaintiff as the trustee of, and for

the use of the owners of the Avalanche ditch, and that the defendants are the owners of such ditch.

The sole question tried in the case, as shown by the testimony preserved in the record and the special issue submitted to the jury, was, whether or not the decree was rendered in favor of Stafford as trustee for the ditch owners, or for his own individual use and benefit; and whether Stafford, by his deed of March 30, 1878, conveyed to Hornbuckle and Marshall the water so decreed to him.

1. The rendition of the decree in the case of *Gallagher et al. v. Basey et al.* being admitted in the answer, the introduction of the decree in evidence could not have injured the defendants, for it was but proving what they had already confessed, and as they made no objection and saved no exception to the introduction of the same, they cannot now predicate error upon its being received in evidence.

And for the same reason that the rendition of the decree was admitted in the answer, and its validity unquestioned, the pleadings in the case in which the decree was rendered were properly excluded from the jury. There were no averments in the answer asking to have the decree in that case set aside or declared void. There was no attack made upon the decree and no allegation that the same was not warranted by the pleadings in the case. The defendants claimed title to the water named in the decree by virtue of the same, and the plaintiff's conveyance to them, upon the ground that the decree was rendered for their benefit, and they were therefore in no position to, and they did not attack the validity of the decree in their answer herein, and hence no question arose in the case calling in question the decree, and for that reason [the rendition of the decree being admitted] the pleadings therein were properly excluded from the evidence. Under the averments of the answer the appellants could not have been prejudiced by the exclusion of such testimony. There were no averments therein that the pleadings in the Gallagher and Basey case would have tended to have proved, and there were no averments in the complaint or replication that such pleadings would have tended to disprove. Even if there was error in

rejecting those pleadings it was an error without prejudice or injury, and a judgment will not be reversed for such an error. *Jackson v. Hastings*, 46 Cal. 234; *Moon v. Rollins and Condrey*, 36 id. 333. It does not appear for what purpose the pleadings in that case were offered in evidence or how they became material.

After the rendition of the decree had been admitted and its validity confessed by the defendants in their answer, if these pleadings were to go in evidence, their materiality should have been pointed out. It is claimed in the brief of appellants that as to the water decreed to Stafford it was outside of any issues tendered in the pleadings in that case, and that a court will not in a decree declare any fact not put in issue by the pleadings. This is undoubtedly true, but the decree is presumed to be supported by every thing necessary to its validity, until the contrary appears by averment and proof, and if the defendants had wished to attack the decree, they should have made the necessary averments in their answer, instead of which they claimed title under the decree and thereby affirm its validity. They aver in substance in their answer that the water decreed to Stafford belonged to him in his own right, and that he for the consideration named in the answer, and prior to the rendition of the decree sold the same to the Avalanche Ditch Company; that the decree, though rendered in the name of Stafford, was for the benefit of the company, Stafford being simply a trustee.

They therefore affirm the validity of the decree and take issue only upon the question whether the water so decreed to Stafford belonged to him or to the Avalanche Ditch Company.

2. It appears by the admission in the pleadings and the proofs that it required 125 inches of water at the head of the defendants' Avalanche ditch to make 35 inches at the head of plaintiff's White and Tower ditch, and it is necessary to determine whether under the decree aforesaid the plaintiff is entitled to the use and enjoyment of all the water that must pass the head of the defendants' ditch to make the required amount at the head of plaintiff's ditch. The decree provides "and it appearing from the premises to the satisfaction of the court that as against the plaintiffs (these defendants and another) in this action, the right of the

defendant (the plaintiff) J. V. Stafford to the use and enjoyment of such an amount of the waters of Avalanche creek mentioned in plaintiffs' complaint, to be taken from said creek at the head of defendant's ditch (the Avalanche ditch) as would amount to 35 inches at the head of the plaintiffs' (White and Tower) ditch is clearly and fully established, and that as against the defendants in this action, saving the above amount of the waters of said gulch, the plaintiffs in this action are clearly entitled to the free use, occupation and enjoyment of 215 inches, miners' measure of the waters of said Avalanche creek to be taken therefrom at a point where their said ditch taps said Avalanche creek as described in said complaint, and that the said plaintiffs have an indisputable right as against the defendants to have said amount of the waters of said gulch at all times to flow down said creek to the head of said ditch." The defendants are therefore perpetually enjoined from interfering with the flow of Avalanche creek to the amount of 215 inches thereof down the natural channel of the gulch to the head of the plaintiff's ditch. This is subject, however, to the right of Stafford at all times to take of the waters of said creek 35 inches at the point thereon where the plaintiff's ditch taps the same, or at any point on said creek above where plaintiff's ditch taps the same.

Under this decree the Avalanche Ditch Company (now these appellants) were required to let flow past the head of their ditch sufficient of the waters of said creek as would make 35 inches at the head of White and Tower, the respondents' ditch. The decree declares that Stafford's right to take such an amount of the waters of said stream *at the head of the company's ditch* as would make 35 inches at the head of his ditch *is clearly established*; and in consequence of this right of Stafford it is adjudged that he may at all times and *at any place* on said stream above his ditch take 35 inches of the waters of the stream, which 35 inches, considering the right found to exist in the respondent to take sufficient of said waters at the head of appellant's ditch as should make 35 inches at the head of respondents' ditch, and considering the decree as a whole, must be construed to mean such an amount of said waters as would make 35 inches at the head

of respondent's ditch. That is the point designated in the decree for the measurement of the water, and the respondent is the owner not only of the 35 inches at the head of his ditch, but of sufficient of the waters of the stream at the head of the appellants' ditch, or at any point above his ditch, as would make the required amount at the point of measurement. That is to say, if it requires 125 inches of water at the head of appellants' ditch to make 35 inches at the head of respondent's ditch, then under this decree the respondent is entitled to the 125 inches at the head of appellants' ditch, and is entitled to take such amount of said waters at that point. The intention of the decree, as shown by the language thereof, was and is to give to Stafford at the head of appellant's ditch, accompanied with the right to take the same at that point, or at any point below, sufficient of the waters of the stream to make 35 inches at the head of respondent's ditch. The designation of 35 inches at that point was only a means of measuring the amount that Stafford became entitled to at the head of appellants' ditch and the amount they were required to let flow past their ditch for the use and benefit of Stafford. The amount of water which they were thus required to let flow past the head of their ditch is found to be 125 inches, and that amount of the waters of the stream under the decree the respondent became entitled to at any point between the head of appellants' and respondent's ditches.

What Stafford may have done to improve the stream and to prevent the loss of water between his ditch and that of the appellants, or what other waters he may have turned into the stream since the rendition of the decree, between these two points, does not affect the question. His right must be determined by the decree and its application to the surrounding conditions at the date thereof.

3. It was sought by the appellants to show that the 35 inches of water so decreed to Stafford were by him conveyed to them by the deed of March 30th, 1878, and for this purpose they asked Hornbuckle, one of the appellants, the following question: "What, if any thing, was said at the time (that is at the time of making the deed) by Stafford as to any individual claim by

Stafford to rights in the Avalanche gulch?" The deed in plain, unambiguous terms purports to quitclaim to Hornbuckle and Marshall the interest of Stafford in the property of the Avalanche Ditch Company, expressly reserving from said conveyance the individual rights of Stafford. His individual right to the waters of Avalanche creek was, therefore, not affected by this quitclaim of his interest in the company property.

Where there is no estoppel pleaded and no fraud alleged the deed must speak for itself. Evidently the purpose of this inquiry was to show that the title to the White and Tower ditch passed to the appellants by the conveyance, for the reason that the respondent failed to declare his title thereto. In other words, that he is estopped by his silence. In the absence of fraud, silence does not work an estoppel. Fraud must be pleaded before it can be proved. And estoppel *in pais* cannot be established in the proof without being alleged in the pleadings. But the respondent was not silent. The deed carefully excludes from the property conveyed all such as the respondent owned in his individual right, and whether he thus owned this 35 inches of water was the sole question tried in this case. In the absence of any fraudulent concealment, the respondent could well stand upon the plain, unambiguous language of his deed as excluding from the conveyance his individual property. Fraudulent concealment, like any other fraud, should have been pleaded, and the proof of mere silence, in the absence of an allegation of fraud, does not establish or tend to establish an estoppel. *Griswold v. Boley*, 1 Mon. 560. The case does not come within that of *Ming v. Woolfolk*, *ante*, 380; and the question asked the witness was properly excluded.

4. The original members of the Avalanche Ditch Company, grantors of the appellants, had given testimony tending to show that, by virtue of an oral agreement with such grantors, the respondent had divested himself of his title to the water in question.

As affecting their credibility and the weight to be given to their testimony, it was competent for the respondent to show in rebuttal that such grantors had made different and contradictory statements to that testified to by them. And this is not in con-

flict with the rule that the declarations of a grantor in disparagement of his title are inadmissible. The appellants attempted to show that the respondent had parted with his title to this water by the oral declarations of their predecessors in interest, and as discrediting their evidence it was competent, as in any other case, to show that they had made contradictory statements, and that ever since the deed aforesaid, and prior thereto, they had always recognized and acknowledged the respondent's individual right to the water in question.

At the close of this rebutting testimony by the respondent, the record shows that the court announced to the attorneys of the appellants that they were at liberty to introduce any evidence to contradict or invalidate any evidence theretofore produced by the respondent, as if such evidence had been given and introduced by him in chief in making his case in the first instance.

This opportunity given appellants put the matter entirely at rest, and placed them in the same position as to the production of evidence as if this testimony of respondent had been given when he opened his case, and no possible injury could have resulted to them by the court so directing the order of proof, as it had the right to do. And whether this evidence was properly rebutting testimony or not is wholly immaterial so long as the appellants were given an opportunity to contradict or disprove it.

5. Upon the general assignment of error that the evidence does not support the verdict or special issues found by the jury, we cannot inquire to ascertain the fact or examine the question. The assignment of error should specify particularly and clearly in what respect the evidence fails to support the verdict or it will be disregarded. This has been too often decided to need repeating here.

6. It is contended that the second instruction given to the jury made it incumbent upon the appellant to show that respondent had parted with the 35 inches of water. The effect of the instruction was that if the respondent had shown that he was the owner of and entitled to the possession of this water for irrigating purposes, the law would presume that such right continued until it was shown that he had parted with the same. The instruction

is correct. If the respondent, by his proof, established title in himself, it was then incumbent upon the appellants either to disprove the title of respondent or to show that he had parted with the same.

It is also claimed that the court, in the instruction number five, left it to the jury to say what was admitted in the pleadings. This is not a correct interpretation of the instruction. The instruction charges the jury, that as to the ownership of the 35 inches of water, the appellants admit the legal title to the same to be in the respondent, and assert that they are the equitable owners by reason of a transfer of the same to the Avalanche Ditch Company, and, therefore, that the burden of establishing such transfer by a preponderance of evidence is upon them. The instruction places the same burden upon them in case the respondent did not rely upon the admission in the pleadings, and should by the evidence show the title in himself. That is to say, this title being undisputed or conclusively established, the burden would then be upon the appellants to show such a transfer after declaring that the legal title of the respondent is admitted in the pleadings, and therefore that the burden of establishing their equitable title is upon the appellant; the instruction further declares, that "if it is admitted in the pleadings or proved to your satisfaction that the legal title to this water is in the plaintiff, then the defendants, in order to maintain their defense, must show their equitable title, and that the plaintiff is trustee for them, by a preponderance of evidence." The purpose of this part of the instruction was to inform the jury that the same quantity of proof would be required to establish the equitable title of appellants, either if the legal title of respondent was *admitted* in the pleadings or *established* by the proof.

We see no error in the record and the judgment is affirmed with costs.

*Judgment affirmed.*

## DYAS, respondent, v. KEATON, appellant.

PRACTICE — *facts constituting waiver of defective notice in summons.* A. commenced this action against B., to recover damages for slander and the summons notified B. that, if he failed to appear and answer the complaint, judgment would be taken against him for the sum claimed in the complaint and costs. B. filed a motion to quash the summons on the ground that this notice was in conflict with the Civil Practice Act. The court overruled this motion and B. filed a demurrer to the complaint, which was overruled, and then filed his answer. The cause was continued for the term, at the request of B., who filed an amended answer under a stipulation of the parties. Afterward, B. filed a second amended answer and proceeded to a trial upon the merits, and judgment was entered for A. B. excepted to the action of the court in refusing to quash the summons, and assigned the same as one of the grounds of his motion for a new trial. *Held*, that the notice in the summons was illegal, and that B. waived the defects in the summons by his acts after his motion to quash the same had been overruled.

*Appeal from Third District, Meagher County.*

THIS action was tried by a jury before WADE, C. J.

Upon the first hearing of this appeal, an opinion was delivered by Mr. Justice KNOWLES, and the judgment of the court below was reversed. BLAKE, J., concurred, and WADE, C. J., dissented. A motion for a rehearing was filed and the cause was reargued at a subsequent term upon the questions referred to in the opinion. The authorities on which the original opinion was based are contained in the appellant's brief.

E. W. & J. K. TOOLE, for respondent.

Appellant appeared voluntarily and answered, and went to trial on the merits and thereby waived any defect in the summons. The substantial rights of appellant have not been affected by the summons. If appellant desired to take advantage of the error in the summons, he should have appealed from the judgment thereon, and not appeared and answered. *Smith v. Curtis*, 7 Cal. 587; *Gale v. Tuolumne W. Co.*, 14 id. 28.

The cases relied on by this court in the first opinion are not analogous to that under consideration. The appellant answered

and gambled for a verdict, and it is too late to say the summons will not support the judgment.

Under the Civil Practice Act, the court must disregard errors or defects which do not affect the substantial rights of the parties. Civ. Pr. Act, § 117. Appellant was not forced to a trial, and the cause was not tried for one year after the ruling on the motion to quash the summons. So far as his substantial rights are concerned, he is in the same position as he would have been if the summons had been regular. *Sloan S. Mill v. Guttshall*, 3 Col. 11; *Freas v. Engelbrecht*, id. 377; *Fleeson v. Savage S. M. Co.*, 3 Nev. 157; *Caples v. Central P. R. Co.*, 6 id. 268; *Grand Chute v. Winegar*, 15 Wall. 355; *Chambers Co. v. Clews*, 21 id. 317.

Appellants appeared voluntarily and demurred to the complaint. No appeal was taken from the judgment, and the ruling on the summons was not reviewable by this court. A new trial can only be granted when the substantial rights of the aggrieved party are affected. Civ. Pr. Act, § 233. Appellant should file an affidavit showing that he had been prevented from having a fair trial. Civ. Pr. Act, § 234. Appellant has not been injured and the merits of the controversy are against him. The only thing involved is the time the appellant should have to frame issues and prepare for trial. He was content with this.

WOOLFOLK & BULLARD, for appellant.

The deductions by respondent from *Smith v. Curtis*, 7 Cal. 587, are not warranted by the decision therein. The question in *Gale v. Tuolumne W. Co.*, 14 Cal. 28, relates to demurrers.

Appellant never waived the errors in the summons, and the first decision of this court was correct. *Deidesheimer v. Brown*, 8 Cal. 339; *Lyman v. Milton*, 44 id. 634; *Kent v. West*, 50 id. 185. These cases are analogous to that at bar. It was not necessary for appellant to appeal from the decision of the court on the motion to quash the summons before trial. These decisions were made under the same sections of the Civil Practice Act as those relied on by respondent.

Appellant excepted to the order of the court affecting the sum-

mons, and his subsequent appearance to prevent a default was not voluntary.

This court cannot on this hearing consider the question of jurisdiction raised by respondent, and the right to appeal from the ruling on the motion to quash the summons cannot be inquired into.

GALBRAITH, J. This is a rehearing upon the question of whether or not the court below erred in overruling a motion to quash the summons; and also, if such action was erroneous, whether or not the judgment against the defendant should be reversed by reason of this error.

The action was for slander and brought to April term, 1876. The summons contained a notice that if the defendant failed to appear and answer the complaint, as required therein, the plaintiff would take judgment against him for the sum claimed in the complaint, and the costs of suit. The defendant appeared specially and moved to quash the summons for the following reasons: First. "That the above notice was not such as is required by law." Second. "That there is a total variance between the summons and the complaint in that the complaint is for unliquidated damages and not upon contract, and the notice contained in the summons should have been in conformity with the second subdivision of section 32 of the Civil Practice Act of Montana Territory \* \* \* instead of the first subdivision of said section." This motion was overruled. The defendant then demurred, which being overruled, he filed his answer. The cause was then continued at the instance of the defendant until the next term, being the April term, of the court for 1877. On the 24th of February, 1877, in pursuance of a stipulation made with the plaintiff, the defendant filed an amended answer. At the April term, 1877, all of the amended answer except the general denial and prayer was stricken out on motion, and the next day a second amended answer filed. To this a motion to strike out was made which was overruled, whereupon the plaintiff replied. The cause was then tried.

There was a verdict and judgment thereon for the plaintiff.

A motion for a new trial was made which was refused. The

defendant then appealed. There were several assignments of error, among which was the action of the court in overruling the above motion to quash the summons. The appeal was heard at the January term of the supreme court, 1879, and at the same term the judgment in the court below was reversed on the sole ground that it was error to overrule the motion to quash the summons. The rehearing is, therefore, upon this point alone.

1. The first question presented for our determination is as to whether or not the court erred in refusing to quash the summons. Section 28 of the Civil Practice Act required that "civil actions in the district courts \* \* \* shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons thereon." Section 32 of the same act also provided that "there shall also be inserted in the summons a notice in substance as follows: First. In an action arising on contract for recovery only of money, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint. Second. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein." This being an action for slander the second form of notice should have been in substance inserted in the summons. Although the language used by the legislature in this section, viz.: "there shall also be *inserted* in the summons a notice, *in substance* as follows:" and also, the requirement in section 30 of what the summons shall state, would seem to contemplate that the summons was complete without such notice. Yet the language in section 32 is itself mandatory. The notice mentioned therein is expressly required by the law-making power to be inserted in substance in the summons.

It is not the province of courts to inquire into the expediency or necessity of legislative action, but to see that substantial compliance is made with its requirements when they do not contravene common right or the fundamental law. No more, so far as obedience to the law is concerned, should there be a failure to observe this mandate requiring a particular kind of notice to be inserted in the summons than any other requirement of the

legislature, in relation thereto. The opinions of the courts of those States whose Practice Acts contain the same or a similar provision, so far as we have had access thereto, unite in maintaining that a failure to insert the notices as required is such an irregularity or informality as that a summons so defective will not sustain a judgment by default. *Porter v. Hermann*, 8 Cal. 619.

The defendant may appear for the purpose of making a motion to quash such defective summons, and for that purpose alone. The motion to quash the summons was made at the earliest opportunity. There was no express or implied waiver of the informality or irregularity before the motion to quash was made. We must, therefore, conclude that it was error in the court below to overrule the motion to quash the summons and that the same should have been sustained.

2. Had the appellant appealed from a judgment entered against him, upon the overruling of the motion to quash the summons without proceeding further in the action, and stood upon this error alone, our inquiry would be now closed and such judgment be set aside.

In view, however, of the subsequent proceedings in the cause, our next investigation will be in relation to whether or not the action of the court in overruling the above motion was prejudicial to the substantial rights of the appellants, and if not so prejudicial, whether or not, in view of such further proceedings, the judgment should be reversed by reason of such error.

One of the principal objects of the adoption of the Code Practice was to avoid the technicalities of the common-law procedure, by which it was claimed that justice was often defeated. This was certainly a most laudable as well as desirable object. The practical spirit of the age, which will not brook trifling in business affairs, and whose principal aim is utility, demands that courts should endeavor to secure the attainment of this avowed design in the adoption of the Code. It is the general rule now prevailing in the courts, that wherever and whenever substantial justice is secured, a mere technical error, which is harmless in its character, and which has worked no injury, will not be permitted to defeat or annul the final conclusion or consummation of judicial proceedings.

When a party has not been deprived of a substantial right or has not been injured in the course of judicial proceedings by any error of the court in the conduct thereof, the final determination as a general rule should be sustained. A brief examination of section 32, referred to, and the notice contained in the summons in this case, in connection with the character of the action and the relief demanded in the complaint, may be useful as showing how little and immaterial may be the difference in substance in some cases, such as the one at bar, between the kinds of notice mentioned in said section, and may also aid us in concluding as to whether or not the appellant has been injured or deprived of a substantial right by the action of the court in overruling his motion. The notice complained of was defective by reason of a mistake in substituting the notice required in the first class of cases mentioned in section 32, viz.: Actions "arising on contract for recovery of money only," for that required in the second class of cases, viz.: "other actions."

The notice required in the second class of cases is, that if the plaintiff fail to answer the complaint, the plaintiff will apply to the court for the relief demanded thereon. It will be noticed that in this case the relief demanded is a judgment for money only. It will further be borne in mind that the section itself in question requires only a substantial compliance with its provisions. The only practical difference, therefore, between the kinds of notice in such a case as the one at bar, and such a one as is comprehended in the first class of cases mentioned in the above section, is that in the latter the notice required to be given is that if defendant makes default the plaintiff will take judgment for the sum specified in his complaint, and in the former, that in such a case, the plaintiff will apply to the court for the relief demanded. But the only relief demanded in this case is a judgment for a sum specified. Now the taking of the judgment by the plaintiff, when the defendant makes default, is as really done through the interposition and by virtue of the action of the court, upon the proper proofs being made, as when the court grants the relief demanded.

The failure to insert in the summons the notice required or

the substitution of the wrong notice was not, in our opinion, such a defect as that the summons failed, when proper in all other respects to confer jurisdiction. The authorities generally unite in holding, that if the defendant does not object to the summons when thus defective until after appearance and pleading, the irregularity will be waived. This is not then similar to a case where there is no jurisdiction over the subject-matter, owing to defective process, or where, in an inferior court, the method prescribed by the statute to obtain jurisdiction over the person has not been pursued. In such cases the defect cannot be cured, and the proceedings are not voidable but *coram non judice*, and void. The summons is a writ which requires the defendant to appear and answer the complaint within the period prescribed by law. The summons, as such, would seem to be complete when it contains the requirements mentioned in section 30 of the Practice Act. When it states all which that section requires, it would appear, by the very terms thereof, to be a summons. The language of section 32 of the same act, viz.: "there shall also be inserted in the summons a notice," would also seem to contemplate that it was already a summons before the insertion of the notice. We, therefore, conclude, that in this case the failure to insert the proper notice was simply a technical error—a mere formal defect—which could cause the defendant at furthest but merely a nominal injury.

It may be objected, that the above reasoning, in view of the grounds upon which we found our final conclusion, ought also to sustain the action of the court in overruling the motion to quash the summons; but it must be remembered that our determination in relation to this matter is based upon the fact that the language of the section in question is mandatory. The defendant will be presumed to be injured by the failure of the plaintiff to comply with the provision of the statute in relation to notice, when nothing further appears from the record to have been done by the defendant. The mistake in the notice is a mere technical error, which, however, is by the weight of authority deemed such an irregularity or informality as that a judgment entered in pursuance thereof will be set aside. The plaintiff must com-

ply with an express requirement of the statute, whether necessary or not, or suffer the consequences of his failure by his summons being declared defective, and a judgment by default thereon annulled. What should be our action, however, when the purpose of the summons has been secured by the action of the defendant himself and no injury has resulted from such defective process? In this case the appellant did not choose to stand upon his motion, but without compulsion (except the fear of a default and judgment thereon, which it has been the universal practice of the courts in similar cases, so far as we have examined the reports, to set aside) appeared and demurred to the complaint, which being overruled, he answered, and thereupon asked and obtained a continuance until the next term, being the period of one year. Also by a stipulation with the respondent he filed in vacation before the commencement of the next term an amended answer. This period, in the absence of any showing to the contrary, was certainly sufficient to answer the complaint of respondent and make all the preparation necessary for trial. The defect in the notice was not such an irregularity or informality as would have caused a dismissal of the suit. The only result obtained, had the appellant's motion been sustained, would have been to delay the cause until a proper summons had been served upon him. By procuring the continuance at the first term the appellant obtained all the advantages which he would have secured had his motion to quash the summons been sustained. Instead of standing upon his motion to quash, the appellant appeared and answered, and thereby compelled a trial upon the merits, which was had, after obtaining, upon his own motion, a continuance for one year to make preparation therefor. One of the principal objects of the Code Practice, as has been already intimated, is the attainment of substantial justice by the trial and adjudication of causes upon their merits, disregarding all immaterial variances, errors and defects not affecting the substantial rights of the parties. The law itself controlling our action in the case of errors or defects in the pleadings or proceedings not affecting the substantial rights of the parties is plain and positive. The statute itself provides that "the court shall, in every stage of an action, disregard any error or

defect in the pleadings or proceedings which shall not affect the substantial rights of the parties ; and no judgment shall be reversed or affected by reason of such error or defect." Civ. Pr. Act, § 79. What then has been the general rule of practice in the courts in the case of such errors and defects dictated by reason and justice is in this Territory made fixed and positive by the express act of the law-making power. What is meant by an error or defect not affecting the substantial rights of the parties? It certainly signifies an error or defect which is harmless in its character and which works no injury. We do not see how the action of the court has in any manner injured the appellant even upon the theory that the notice was an essential or necessary part of the summons, or wherein it affected his substantial rights. The summons was complete in all other respects. It contained all the requirements of what the summons shall state as provided in section 30, which prescribes the requisites of the summons. It gave the defendant full notice of the pendency of the action, its character, and the amount for which judgment was demanded. He had a year's time to prepare for trial. He had his day in court. The trial was had to a jury upon the merits. No injury resulted to the defendant from the defective summons, nor is any injury therefrom claimed by him.

By the continuance he obtained all the time he would have received had his motion been sustained. By analysis of the defect itself complained of, as we have already seen, the difference in the notice given from that required is one more of language than of substance.

Wherein then, by the error complained of has the appellant been injured or his substantial rights impaired?

What alternative, therefore, has the court in its action in view of the positive and mandatory language of section 79 of the Practice Act, above referred to, but to obey its provisions?

We have been unable to obtain access to the opinion of the court, given at the rendering of the former decision of this case. But from a remark contained in the respondent's brief, we believe we are warranted in concluding that the above opinion was in a great measure based upon the decisions of the supreme court of

California, in relation to defective summons; or without reviewing the cases referred to in the arguments of counsel in detail, we will simply say that, upon a careful examination of them, we are unable to see their application to the case at bar, in all its aspects as presented to us.

It would seem that as to whether or not the error complained of being a harmless one, was comprehended within the provisions of the Practice Act, contained in section 79 above referred to, and which is identical with that in California, was not presented in the argument of counsel or even adverted to in the opinion of the court. But in the case at bar this phase of the question is presented, and we must, in our decision thereon, act in view of this wise, just and salutary provision of the law. But we can have little doubt, upon due consideration, as to what, of necessity, would be the action of the supreme court of that State in a case where the provisions of the above section are applicable. That court has specified the object of the summons, and has also stated that, when after a defective summons the defendant appears and pleads, there is no injury. In *Smith v. Curtis*, 7 Cal. 584, the court, BURNETT, J., giving the opinion, says: "The only object of a summons is to bring a party into court, and if that object be attained by the appearance and pleading of a party, there can be no injury to him."

Applying then to such a case the provisions of the section in relation to errors and defects not affecting the substantial rights of the parties, and how could a judgment rendered therein, otherwise unassailable, be reversed or affected thereby?

In *Converse, Administrator, v. Warren*, 4 Iowa, 158, there was an entirely defective service of the summons, and the court there held that, although the appellant might have stood upon his bill of exceptions to the action of the court below in overruling his motion to set aside the return of service, and instead of so doing applied for and obtained a continuance, and at the second term the cause was again continued, and after trial judgment was rendered for plaintiff, about one year after the defective service of summons, the appellant could not assign the overruling of his motion as error.

WOODWARD, J., in delivering the opinion of the court, says: "To permit the party to take the objection now, after he has had all the time and all the opportunity which he would have had by granting his motion after a full and fair trial, under any time for preparation, would bring a reproach upon the law, which would be richly merited. The case comes within that class in which it is often held that an error which works no injury shall not vitiate."

It will be remembered that at the period of this decision, the Practice Act of Iowa did not contain either the same or a similar provision as the one above referred to, viz., section 79, in relation to errors and defects not affecting the substantial rights of the parties. It must have been, therefore, that the court so held because the rule was in accordance with the intention and spirit of the Code, and founded in reason and justice.

In this case WRIGHT, C. J., concurred in the decision, but dissented from the reasons assigned therefor. In a separate opinion he says: "I desire to say that I think the service upon defendant was clearly defective for the reasons stated in the foregoing opinion, but hold that, by pleading over and going to trial, he waived the right to afterward object to the sufficiency of the service." "I am clearly of the opinion that under our law and system of practice, as recognized by our earliest and latest decisions, the defendant, if he would ask the decision of this court upon such a question, must stand upon his motion, and leave the plaintiff to take his own course in the cause, and that by pleading over he waives the objection whether the trial is at the same or a subsequent term. He is not compelled to plead over or make any further appearance. If he does so, he thus voluntarily submits to the jurisdiction, and his right to complain of the decision on his motion is by that act as completely taken away as it is by any number of after continuances, motions and trials."

Without at present intimating concurrence or non-concurrence in this opinion of Chief Justice WRIGHT, until a case requiring it shall be presented for adjudication, we deem it sufficient, in view of the history of this case, to base our final determination upon the following grounds, viz.: That although the action of

the court in overruling the motion to quash the summons was erroneous, yet such error, as is evident from the history of the cause as shown by the record, was harmless and without injury to the defendant. In other words, it was error without prejudice. And also upon the express and positive language of the law in relation to errors and defects not affecting the substantial rights of the parties, which we believe is in harmony with the spirit of the case, and founded upon reason and justice.

The former order of this court reversing the judgment is annulled, and the judgment below is affirmed with costs.

*Judgment affirmed.*

WADE, C. J., concurred.

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RANDALL, respondent, v. GREENHOOD ET AL., appellants.

*PRACTICE — question raised by general exception.* A general exception to leave granted to amend a pleading only raises the general question as to the authority of the court to allow amendments of pleadings during the progress of a trial. This power cannot be disputed.

Immaterial errors of ruling will not reverse a judgment. Though the record shows that the court below erred in allowing leading questions to be put to witnesses, or in disallowing questions proper under some circumstances, yet judgment will not be reversed therefor, if it is apparent from the whole record that appellants have not been injured thereby.

*MEASURE of damages.* When goods are attached and sold by the sheriff the proper measure of damages is the value of the goods at the time of the attachment, and not what they brought at auction.

*PRACTICE — how exceptions must be saved.* The appellate court will not regard exceptions unless they are taken in substantial compliance with the statute. Such exceptions must be reduced to writing, be signed by the judge and filed with the clerk before the submission of the cause to the jury.

*INTEREST — unliquidated demands — interest depends entirely upon statute.* It is not allowed by the statute of Montana on unliquidated demands before judgment. If, contrary to statute, a jury has allowed such interest and it has been included in the judgment, it must be stricken out before the same is affirmed.

*Appeal from First District, Gallatin County.*

E. W. & J. K. TOOLE, for appellants.

Amendments allowed were inserted in the margin of the orig-

inal pleading, and there was no new verification. The question of taking *immediate* possession was a mixed question of law and fact, partly for the court and partly for the jury, and was improper to allow in a leading question. If the question is proper in itself the court will not speculate as to the effect of its answer on the jury.

The following authorities were cited for appellants: 44 Cal. 246; 40 id. 246; 39 id. 609; 14 id. 460, 492.

VIVION & PIERCE, and CHUMASERO & CHADWICK, for respondent.

No exception was taken on the ground of want of verification of pleadings. The amendments did not affect the substantial rights of the parties.

No injury resulted from questions complained of; the matters were sufficiently proved by other evidence.

A judgment will not be reversed on account of erroneous testimony unless appellant suffered injury thereby. *Moon v. Rollins*, 36 Cal. 333; *Mott v. Reyes*, 45 id. 379; *Hastings v. Jackson*, 46 id. 234.

It is for the court to say what is proper cross-examination. *Rea v. Missouri*, 17 Wall. 542. See, also, 22 Cal. 255; 29 id. 160; 12 id. 483; 28 id. 187, 406.

Exceptions must specify errors complained of, or they will be disregarded. *Simonton v. Kelly*, 1 Mon. 363; *Caldwell v. Murphy*, 11 N. Y. 417.

The exceptions were not taken and completed as required by statute. See Cod. Sts. (1872), § 253.

When property converted has a fixed value, the measure of damages is that value with interest from time of conversion. *Hamer v. Hathaway*, 33 Cal. 117; 9 id. 562; *Bohm v. Dunphy*, 1 Mon. 333; *McGavock v. Chamberlain*, 20 Ill. 219.

WADE, C. J. This is an action to recover the value of a certain stock of goods alleged to have been wrongfully converted by appellants.

The record shows that on the 4th day of May, 1878, Messrs. Black & Daniels, merchants, doing business at Bozeman, Gallatin

county, sold their stock of goods and a large amount of other property, to the respondent for the sum of \$15,000, and the respondent after deducting from the sum of such purchase-money, \$770, the amount he was owing them, executed his note to them, payable one day after date for the sum of \$14,230, and as is alleged, took immediate possession of such goods and property.

It further appears that the appellants being creditors of Black & Daniels at the time of such sale, and on the 14th day of May, 1878, commenced an action against them and attached the goods in question, charging that the sale to respondent by Black & Daniels was fraudulent and made to hinder, delay and defraud creditors. They obtained possession of the goods by virtue of their attachment and converted the same. This action was instituted to recover the value thereof. There was a trial and verdict in favor of respondent for \$3,600, and judgment thereon from which this appeal is taken.

There were many exceptions taken during the trial, and we will consider such ones as the appellants rely upon in their brief for a reversal of the judgment.

1. The record shows that the appellants, before the trial commenced, made a motion for judgment on the pleadings which was overruled, and thereafter and during the progress of the trial they asked and obtained leave to amend their answer. Whereupon the respondent asked and obtained leave to amend his replication, to the granting of which leave the appellants excepted, but for what reason the record fails to show. The exception being general, it only raises the general question as to the authority of the court to grant leave to amend pleadings during the progress of a trial. The power of the court to grant leave to either party to amend pleadings during the progress of the trial, and even after verdict and judgment in furtherance of justice, is as well settled and so deeply imbedded in the Code practice as to need no authorities to support it. We will only refer to some of the decisions of this court. See *Wormall v. Reins*, 1 Mon. 627; 2 id. 415.

2. The respondent, being a witness in his own behalf, was asked

the following question: "State whether or not, at the time of the sale and purchase between you and Black & Daniels, you went into the immediate possession of the property and continued so?"

This question was objected to, not so much because it was leading, as because it involved a question of law improper for the witness to answer. The objection was overruled and the appellants excepted.

The question being tried was whether, at the time of the sale, the respondent openly and actually took immediate possession of the goods. In this connection the word "immediate" has no technical or special meaning. It is used in its ordinary sense in the statute.

It signifies, *present, instant, not deferred by an interval of time*, and the question is of the same import as if the witness had been directed to state the facts as to the transfer of the possession, and had answered that at the time the sale was made, the respondent instantly and without any interval of time went into the possession of the property.

Perhaps the form of the question suggested the answer. If this was so, and if technically and strictly the form of the question was improper, yet we cannot see how the appellants could have been injured by the inquiry.

They had the power upon cross-examination to have inquired into all the facts and circumstances attending the transfer of possession. This inquiry opened the door to such cross-examination, aided by the searching power and force of direct leading questions. It is very apparent that the appellants could not have been injured by this question and answer.

3. Z. H. Daniels, being one of the parties to the sale from Black & Daniels to respondent, testified on his examination in chief, concerning such sale and that respondent gave his note for \$14,270, and took immediate possession of the goods. On cross-examination the witness was asked this question: "What was done with the note of Randall after it was given to you?" which was objected to by respondent as not cross-examination, and the objection sustained.

In cases of fraud wide latitude is given to a cross-examination.

Was the sale sham and fraudulent? Was it made to hinder and delay creditors? The execution and delivery of the note had a bearing upon these questions and was competent proof tending to show the *bona fides* of the transaction. Did the respondent really and in good faith give his note for the purchase-price of the goods? Or was its execution a mere blind to cover up a fraudulent sale? The witness having testified in support of the sale, that the note was given, it became competent, on cross-examination, to draw out all the facts and circumstances attending such execution. Was the note given to Black & Daniels, and by them fraudulently returned to respondent? Or did they place it in the hands of a third person for his protection and benefit? All these matters belonged to the case of appellants, but the witness having given in evidence the execution of the note as tending to show the good faith of the sale, it became competent, on cross-examination, to show how the note was disposed of immediately after its execution, if the inquiry was made to show fraud in the transaction. The purpose of the inquiry is not disclosed in the record. We have no means of knowing what the appellants proposed to prove by making the inquiry. The answer to the question might have been competent, or it might not. The appellants ought to have stated and placed in the record what they proposed to prove. Then this court could have passed upon its competency.

But if, by the question and the answer sought, the appellants proposed to prove that the execution of the note was a sham and fraudulent, were they injured by the action of the court in sustaining the objection to the question? Evidently not, for when they came to present their case to the jury they might have placed Daniels on the stand and asked him in precisely the same words, the question they had asked him on cross-examination. Making the witness their own would not have forfeited any of the advantages a cross-examination gave them in such a case, where the inquiry on cross-examination would have been competent upon an examination by them in chief. And so, if the objection to the question had been improperly sustained, none of the substantial rights of appellants were thereby affected, and in such a case, under the provisions of the Code, a judgment should not be reversed.

4. The goods levied on by the attachment in favor of appellants in this action against Black & Daniels were sold at auction by the sheriff. The measure of damages was the value of the goods at the time of the levy of the attachment, and not what they brought at auction as contended for by appellants.

5. Counsel for appellants contend that instruction No. 5, given to the jury at the instance of respondent, was incorrect. The record shows that no exception was taken to instruction No. 5, and that there was no attempt to save an exception thereto.

The Code provides (§ 253) : "If any party to the trial desires to except to any instruction given by the court, or to the refusal of the court to give an instruction asked for, or any modification thereof, he shall reduce such exception to writing and file the same with the clerk before the cause is submitted to the jury." This section contemplates that the exception to instructions shall be reduced to writing in a bill of exceptions (which of course must be signed by the judge) and filed with the clerk before the cause is submitted to the jury. Not one of the exceptions to the instructions, as shown by the record, comply with these requirements. The mere statement of the record that the court was asked to give certain designated instructions, which were refused and an exception taken, or that the plaintiff objected to the giving of certain instructions that were afterward given, to the giving of which, the party objecting excepted, without reducing such exceptions to writing, and filing the same with the clerk, is no compliance with this section of the Code.

As to instruction No. 3, asked for and given at the request of respondent, which, from its substance, is presumed to be the one referred to by counsel as instruction No. 5, the record recites as follows: "And the said defendant objected to the third instruction, requested by the plaintiff for that the same," etc., "and the said objection was overruled, and to which ruling and giving of said instruction, defendants then and there excepted."

Whether the statement was reduced to writing before the cause was submitted does not appear, and it certainly does not appear to have ever been filed with the clerk.

We cannot regard exceptions that have not been taken and

saved in substantial compliance with the statute. If an exception to an instruction should be reduced to writing and signed by the judge, if not filed with the clerk before the submission of the cause to the jury, it could not be considered.

6. In this action respondent sought to recover from the appellants certain property alleged to be wrongfully withheld by them, and in case a return could not be had, the value thereof. The verdict finds for the respondent and for a return of the property mentioned in the complaint, and in the event the same cannot be returned, assesses his damages at \$3,000, the value of the property, and \$600 interest thereon from the date of the levy to the time of trial.

The claims and demands upon which interest is allowed depend entirely upon the statute. This claim or demand of respondent against appellants is not of the kind upon which interest can be allowed until after judgment. See Cod. Sts. 497, § 2; *Isaacs v. McAndrew*, 1 Mon. 454.

The judgment is too large by \$600. It is therefore ordered that the judgment be reduced from \$3,600 to \$3,000, and when so modified, the same is hereby affirmed with costs.

*Judgment affirmed.*

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THE UNITED STATES, respondent, v. Fox, appellant.

**CRIMINAL LAW — right of speedy trial.** The speedy trial to which a person charged with crime is entitled under the Constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial, and in such case a party confined, upon application by *habeas corpus*, is entitled to discharge from custody.

*Appeal from Third District, Lewis and Clarke County.*

THE facts and authorities cited will appear in the opinion.  
No briefs filed.

CHUMASERO & CHADWICK and E. W. Toole, for appellant.

J. L. DRYDEN, U. S. district-attorney, for respondent.

WADE, C. J. This is an application for a discharge from imprisonment on *habeas corpus*.

I will state sufficient of the facts to present the question to be determined.

It appears from the record that the defendant, George W. Fox, was cashier and one of the directors of the People's National Bank of Helena in the Territory of Montana; that at the November term, 1879, of the district court within and for the county of Lewis and Clarke sitting to hear and determine causes arising under the Constitution and laws of the United States, certain indictments were returned against Fox by the grand jury thereof, charging him with the crime of making false entries in the books of the bank, embezzlement, perjury and forgery; that at said November term he was tried upon one of said indictments, which trial resulted in a failure of the jury to agree, and thereupon at the same term another jury was impaneled, but before the close of the second trial, one of the jurymen becoming sick and unable to attend court, the jury was discharged and the cause continued for the term; that at the March term, 1880, of said court, that being the next term thereof after the November term, the defendant demanded a trial upon the indictments aforesaid, and a designated day had, by the court, been assigned for such trials during said term; that in consequence of congress having failed to make the necessary appropriations of money to pay the expenses of marshals in serving process in such cases, and there being no money in the hands of the marshal, or in the treasury of the United States applicable to the payment of such expenses, the marshal of the Territory officially notified the judge of the court of his inability to further serve process by reason of the failure of congress to make the necessary appropriations of money for that purpose, which notice was entered of record and is as follows:

“HON. D. S. WADE, *Chief Justice of Montana*:

DEAR SIR — I recently addressed a letter to the attorney-general referring to the failure of congress to pass the marshals' appropriation bill, stating that I had already advanced an inconveniently large sum to defray the actual expenses of executing process and asking what course I should pursue. In reply I have this day received a communication in which the following language is used:

‘I can only say that if you feel that you have done the utmost that you can do in justice to yourself and your bondsmen, you are, in my opinion, fully justified in informing the judge of the court of your inability to execute process, so that which is returnable at the spring term may not issue. I regret that such a contingency should arise, and can only say that you have done extremely well in having conducted the business for two-thirds of a year without an appropriation.’

Accordingly this is to inform you that I will be unable to execute process on behalf of the United States until congress shall have made an appropriation for such services.

Very respectfully,

ALEX. C. BOTKIN,

*U. S. Marshal, Dist. Montana.*”

Whereupon the court of its own motion made and caused to be entered of record the following order:

“By reason of the foregoing, it is hereby ordered that all United States cases be continued for this March term of court, and United States grand and trial jurors summoned for the term are hereby notified that their services will not be required.”

Thereupon the defendant, after the adjournment of said March term of court, made application to the judge of said court for his discharge from imprisonment upon *habeas corpus*, which was denied and he appeals to this court.

The ground upon which the petitioner bases his right to a discharge from imprisonment is that at the said March term of court he was ready for and demanded a trial upon said several indictments, and that the United States being plaintiff in the cases, and

charged with the duty of providing the necessary money therefor, and speedily prosecuting the same, failed, neglected and refused so to do at said March term, whereby the defendant was deprived of his constitutional right to a speedy trial.

1. Among the principles that adorn the common law, making it the pride of all English-speaking people, and a lasting monument to the noble achievements of liberty over the encroachments of arbitrary power, are the following: No man can be rightfully imprisoned except upon a charge of crime properly made in pursuance of the law of the land. No man, when so imprisoned upon a lawful charge presented in a lawful manner specifying the crime, can be arbitrarily held without a trial.

These principles are in accord with the enlightened spirit of the common law, and form a part of the framework of the English Constitution. They are guaranteed and secured by Magna Charta, the Petition of Rights, the Bill of Rights, and by a long course of judicial decision, and they belong to us as a part of our inheritance from the mother country. These rights were claimed by our ancestors in Colonial times, and they have been engrafted into and secured by our Constitution, the supreme law of the land, which, in article six of the amendments, provides:

ART. VI. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."

Within the meaning of this article of the Constitution what is a speedy trial?

At the time of the adoption of the Constitution the common law was in force in this country so far as applicable, and the terms used in that instrument ought to be construed with reference to their common-law meaning.

Some idea of the term, "speedy trial" at common law may be gathered from the fact that by that law, in order to insure the

trial of all prisoners within a certain time, a patent in the nature of a letter is issued from the king to certain persons appointing them his justices, and authorizing them to deliver his jails. Bouv. Law. Dic., title Gaol Delivery.

The jails are thus cleared and all offenders tried, punished or delivered twice in every year, 2 Blackst. Com., Book IV, 270, Shars. Ed.

And so it is but a reasonable inference that, at common law, if the prosecution, by its neglect and laches, fails to prosecute, and thereby detains a prisoner in jail, who ought but for such neglect to have been tried, such detention would be the denial of a speedy trial. By the common law the jails are cleared twice in each year in order to secure to the prisoners therein confined a speedy trial, and if by the neglect of the prosecution to prepare for trial they are imprisoned for a longer period than the law contemplates, this would be the denial of a speedy trial.

Neither the Constitution nor any law of congress, so far as I have been able to ascertain, fixes the time within which a person accused of crime and imprisoned shall be tried. But both the Constitution and the law contemplate that a trial shall be had, after the lapse of such time as, in the exercise of reasonable diligence, may be required to prepare for trial. The adjudications upon this subject are not numerous, but a resort to general principles and the spirit of the law renders the problem easy of solution.

The law guards with jealous care the rights of a person charged with crime, and with equal care the right of the people, as a matter of security and safety, to have crime punished. Every step in a criminal prosecution must be according to law. There must be an indictment found and presented by a lawful grand jury specifying the precise charge to be tried. The accused shall be provided with counsel either by himself or the government, and he shall have the process of the court to compel the attendance of his witnesses. He is to be afforded an opportunity to prepare for his trial before an impartial jury, and when thus provided with all these means to secure a fair trial, if he, by his neglect, fails or refuses so to do, he cannot have the same postponed or put over because he is not ready for a trial.

And so on the other hand the law will not tolerate any neglect or laches on the part of the prosecution in bringing a defendant to trial. Especially is this the case, and the principle applies with stronger force, if the person charged with crime is in prison demanding a trial, and sufficient time has elapsed since the finding of the indictment, to enable the prosecution, in the exercise of reasonable diligence, to be ready for trial. A person charged with crime, whether in prison or on bail, has the right to demand diligence on the part of the prosecution, to the end that he may speedily know whether he is to be convicted or acquitted.

A criminal case, like a civil case, may be continued from one term to another when it satisfactorily appears that the party asking for a continuance has used reasonable diligence to be prepared for trial, and has failed, but in the absence of reasonable diligence on the part of the party asking for a continuance, the opposite party may insist upon a trial, even though such trial must necessarily result in the acquittal of a person charged with crime. If the prosecution or defendant are not ready for a trial after the lapse of a reasonable time in which to get ready, they must first relieve themselves from any neglect or laches before they can ask for a postponement of the trial.

The speedy trial, to which a person charged with crime is entitled under the Constitution, then is, a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial.

In *Ex parte Stanley*, 4 Nev. 116, the court, in defining the meaning of the term *speedy trial*, says: "But what is to be understood by a *speedy trial* is the embarrassing question now to be determined. It is very clear that one arrested and accused of crime has not the right to demand a trial immediately upon the accusation or arrest being made. He must wait until a regular term

of the court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial. Nor does a speedy trial mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation. The law is the embodiment of reason and good sense, hence, whilst it secures to every person accused of crime the right to have such charge speedily determined by a competent jury, it does not exact impossibilities, extraordinary efforts, diligence or exertion from the courts, or the representatives of the State; nor does it contemplate that the right of a speedy trial which it guaranteed to the prisoner shall operate to deprive the State of a reasonable opportunity of fairly prosecuting criminals."

In the case of *Klock v. The People*, 2 Park. 676, the defendant was put upon his trial for the crime of arson. During the progress of the trial the prosecution offered certain evidence to which the counsel for the prisoner objected, and the objection was sustained, whereupon, on motion of the attorney prosecuting, and without the consent and against the objection of the accused, a juryman was withdrawn and the jury discharged. At the ensuing term the attorney prosecuting again moved the trial of the indictment, and the defendant as a plea in bar set up the foregoing facts. On demurrer the plea was held insufficient, and the appellate court, in reversing this decision, says: "The real question is, whether it is allowable for a public prosecutor, after having entered upon his case by the giving of evidence to a jury impaneled for the trial of an indictment, to withdraw a juror and thus arrest the trial, so as to enable him to try the party at a subsequent time, solely because he finds himself unprepared with the proper evidence to convict, when his condition is not the result of improper practice on the part of the defendant, or some one acting with and for him, or some overruling inevitable necessity."

Counsel for the people insisted that the accused could not

object to a second trial for the reason that his case did not come within the constitutional provision which declares that "no person shall be subject to be twice put in jeopardy for the same offense" (art. 1, § 6), and the court says: "The plaintiff in error has not been once tried so as to bring himself within the constitutional protection, as no verdict or judgment has been given. The true ground of the objection lies back of the Constitution, and is found in the principles which have been deemed essential to the full and fair protection of individuals accused of crime, and to secure to them a speedy and impartial trial and the best means of indicating their innocence," and the decision of the court below in sustaining the demurrer to the plea in bar was reversed and the prisoner discharged.

The analogies of this case have a bearing upon the one we are considering. If asking for and obtaining the postponement of a criminal case for the reason that the prosecutor suddenly, during the progress of the trial, found himself unprepared to proceed, because the evidence he had offered had been excluded from the jury, was a denial to the accused of a speedy trial, then certainly it would be a denial of a speedy trial if the prosecution (the United States in this case) had neglected and failed not only to offer any evidence whatever, but to secure the attendance of any witnesses in the case. In the case referred to there was an attempt in good faith to have a trial. In the case we are considering, a whole term of court passed without any attempt or effort whatever on the part of the prosecution to bring the case to a trial. The indictments were found at the November term, 1879, and two trials were had at that term, which resulted in mistrials. At the ensuing March term the prosecution failed and neglected to bring the cases to trial, and made no effort whatever in that direction. The government entirely failed to provide any means for paying the expenses of serving process, and entirely neglected and refused to procure the attendance of witnesses on the part of the prosecution. It did no more than as though these indictments had not been pending against the defendant.

The prosecution was guilty of laches and a neglect of duty, in so failing and refusing to prosecute, and such failure was a

denial to the defendant of his constitutional right to a speedy trial. The government of the United States cannot cast a man into prison and then fold its arms and refuse to prosecute.

And it is not material to inquire for what reason the government failed and neglected to prosecute these indictments, or why the appropriations of money to enable marshals to serve process failed in Congress. The fact is sufficient for the purposes of this case.

The prayer of the petition is granted and the petitioner discharged from imprisonment.

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TERRITORY, respondent, v. KENNEDY, appellant.

CRIMINAL LAW — competency of juror — opinion and prejudice. A. testified in April, 1880, upon his examination respecting his qualifications to serve as a trial juror in a criminal case that he had not formed or expressed any opinion as to the guilt or innocence of the defendant. He was accepted as a juror. After the verdict had been returned, it was proved that A. had stated before the trial in June, 1879, that the defendant was guilty and that he would hang him. A. then testified that he had forgotten these statements, and that he had no prejudice against the defendant when he was sworn to try the cause. Held, that A. was not a competent juror under the laws of this Territory.

*Appeal from Second District, Deer Lodge County.*

THIS cause was tried by GALBRAITH, J.

H. KNOWLES and J. C. ROBINSON, for appellant.

A. E. MAYHEW, district attorney, second district, for respondent.

CONGER, J. This is an indictment for murder, upon the trial of which the defendant was found guilty of murder in the second degree, and sentenced by the court to seventeen years in the penitentiary.

Appellant's counsel took various exceptions to the ruling of the court, and to the instructions by him given on the trial.

They also filed at the close of the trial affidavits of the incompetency of one of the jurors impaneled. And on these grounds moved the court for a new trial, which motion was by the court overruled. From the judgment of the court below an appeal was taken to this court.

The following appears of record in the transcript before us :

"And for further ground of new trial, said defendant sets forth that he did not have, and was not tried by a competent jury as required by law, in this: that one Henry Douglas, one of the jurors impaneled in said cause, testified on his examination as to his qualification as a juror; that he had never formed or expressed an opinion as to the guilt or innocence of said defendant, and was thereby accepted by defendant as a juror; but that said Douglas, after the homicide had been committed, and prior to the said trial, and upon hearing the facts and circumstances attending the same, expressed and in unqualified terms, his opinion as to defendant's guilt, to the effect, that he, said juror, believed defendant to be guilty of murder and ought to be hanged, and which said facts will appear by the affidavits of Patrick McAndrew and James Pierce, and hereto attached; and by the affidavits of the counsel for defendant, as to what said juror testified to at said trial.

"Hiram Knowles and J. C. Robinson, being duly sworn, say on oath, each for himself, that he is attorney for said defendant and was present in said court when the jury was impaneled in said cause, and attended thereto on behalf of said defendant.

"That one of said jurors who was so impaneled and who composed a part of said jury was one Henry Douglas, who after having been sworn on his *voir dire*, testified: that he had not prior thereto formed or expressed any opinion as to the guilt or innocence of said defendant, whereupon he was by defendant accepted as a juror by defendant.

"James Pierce, being duly sworn, says on oath that he is of lawful age, and resides on the Little Blackfoot river in Deer Lodge county, Montana Territory, and about ten miles from the

town of Deer Lodge ; that he is well acquainted with one of the jurors impaneled and sworn, and who was one of the jurors in the above-entitled cause, and before whom said defendant Kennedy was tried upon an indictment for the killing of one Thomas H. O'Connor ; that about the 9th day of May, 1879, said Henry Douglas and affiant had a conversation, in which said Douglas represented to affiant that he, Douglas, had then recently had a conversation with said O'Connor, said deceased, in relation to his, said O'Connor's, business affairs, and that he, said Douglas, represented to affiant that O'Connor had said to him, affiant Douglas, that if his, O'Connor's, creditors would let him alone, he would pay all up, and that said Douglas said he felt very sorry for said O'Connor.

“ That about the 22d day of June, 1879, he, affiant, had another conversation with said Douglas, and which was the next day after said O'Connor was shot by said Kennedy, and said conversation was upon affiant, and said Douglas having heard of the said shooting of said O'Connor by said Kennedy, and that the facts attending said shooting were spoken of and talked of by said Douglas and said affiant ; and that in said conversation said Douglas expressed sympathy for said O'Connor and a strong prejudice against said Kennedy, and spoke in very strong and vehement terms against said Kennedy, and to the effect that he, said Douglas, believed said Kennedy to be guilty in killing said O'Connor.

“ And that about said time he, said affiant, heard a conversation of a very animated and loud and excited nature between said Douglas and one Patrick McAndrew, in relation to said matter of homicide, and that in said conversation, he, affiant, did not take particular note of what was said ; but that he could hear and understand enough thereof to know that said Douglas spoke in very strong and bitter terms against said Kennedy, and seemed very much prejudiced against him, said Kennedy.”

“(Signed)

JAMES PIERCE.”

Patrick McAndrew, being duly sworn, upon oath says : “ That he is of lawful age, and that he is and ever since the 1st of June, 1879, has been acquainted with one Henry Douglas, being the

same Henry Douglas who sat upon and constituted one of the jurors in the above-entitled cause at the April term of said court, 1880, in the trial of said Kennedy on an indictment for the killing of Thomas H. O'Connor, deceased. That about the 22d day of June, 1879, affiant had a conversation with said Henry Douglas as to the homicide, and which said conversation was at the premises of one James Pierce on the "Little Blackfoot river," about ten miles from the town of Deer Lodge, and that said James Pierce was present during a part of said conversation and in the vicinity of affiant and said Douglas during the remainder thereof; and that in said conversation, he, affiant, and said Douglas talked at considerable length as to said homicide, and discussed the affairs between said O'Connor and said Kennedy, and said Douglas, in said conversation, was very much animated and excited, and expressed a very strong bias and prejudice against said Kennedy, and as to the entire of what he, said Douglas, then said, affiant cannot remember; but in no part thereof did said Douglas express any feelings than of hostility to said Kennedy, and sympathy for O'Connor's end, said without qualification, among other things, that he would hang him, said Kennedy, or any other man who would do what Kennedy did in shooting said O'Connor.

(Signed)

PATRICK McANDREW."

Be it remembered that on the 22d day of May, 1880, prior to making any ruling or decision on the motion of defendant for a new trial, the court called the juror, Henry Douglas the same juror named in the statement of defendant for motion for new trial, and affidavits of Patrick McAndrew and James Pierce, and proceeded to swear said Douglas to answer such questions as might be propounded to him touching his qualification as a juror in said cause and as touching the matter on hearing. That said Douglas proceeded to testify and answer such questions as were asked by the court, and which said questions and answers were as follows:

Question by the court: State your name. A. Henry Douglas.

Q. Are you the same Douglas who was a juror in the case of "*Territory v. Kennedy*" at this April term? A. Yes.

Q. Do you remember of having any conversation with Pierce and McAndrew as stated in the affidavit of McAndrew? A. I did; at the time I went into the jury box I had forgotten all about this; I had no opinion or prejudice one way or the other at the time of my examination on my *voir dire*, and during my service as juror in said cause. After the trial was over, McAndrew came into the stable and spoke to me about it. That was the first time I remember of the conversation referred to.

Q. State whether or not, on your examination for cause as a juror or during the trial thereof, you had any hostility against the defendant Kennedy? A. I had not.

Q. State whether or not you ever had any hostility toward Kennedy? A. I had no hard feelings or hostility against Kennedy in any shape, and never had any reasons to have any; I was one of the jurors that voted for manslaughter.

Q. Did you ever have any feelings of prejudice against Kennedy? A. Never.

Q. (Pierce's affidavit read to witness Douglas.) Do you recollect of having the conversation stated in Pierce's affidavit? A. I do; it is the same conversation.

Q. Did you recollect this conversation when you went to the jury box in said cause? A. I did not at all.

Q. Are you positive? A. I am.

Q. Did you have feelings of hostility toward Kennedy? A. No; I never had; did not know Kennedy.

Q. Do you recollect of ever having had the conversation referred to? A. I do now, part of it.

Q. Do you recollect, that in that conversation you expressed a strong prejudice against Kennedy? A. I can't say that I do.

Q. Did you recollect, at the time of your examination as a juror, of having previously expressed an opinion that you believed Kennedy guilty of killing O'Connor? A. I did not.

Q. Do you recollect now that you ever expressed the opinion that Kennedy was guilty of killing O'Connor? A. I believe in that conversation referred to, I did so state upon the account of it that

I heard ; which was altogether different from what was the true account.

Q. Did you recollect while on the jury that you had expressed the opinion referred to, until it was called to your attention by McAndrew ? A. I did not.

Q. Did you recollect at the time of your examination as a juror and while you were acting upon the jury and until your attention was called to it by McAndrew as you have stated ever having spoken in strong and bitter terms against Kennedy and exhibited prejudice against him ? A. No, sir ; I did not.

Q. State whether or not you were asked the question upon your examination *voir dire* as a juror in said cause — whether you had any bias or prejudice against defendant Kennedy ? A. I think I was.

Q. What was your answer ? A. I had none.

Upon conclusion of the examination by the court, counsel for the defense are asked if they had any thing to suggest relating to the examination of said witness or any cross-examination of witnesses.

Whereupon counsel for defense asked the court whether this inquiry is made upon the motion of the court or district attorney ; and is informed that it is upon the motion of the court.

And this cause is now opened by the court for further argument of counsel And no further argument is submitted.

Whereupon it is ordered by the court, that this statement be filed in this cause and constitute a part of the minutes of this court and of this cause, filed May 22, 1880.

Attest — GEO. W. IRVINE, *Clerk*.

That at the close of said examination said court announced that said Douglas was so examined at the instance of the court and not the district attorney. That prior to any questions having been asked said Douglas, defendant's counsel objected to said examination.

(Signed)

WM. J. GALBRAITH, *Judge*.

May 22, 1880.

The court are referred by appellant to the following authori-

ties, to sustain their view of the case: *United States v. Upham*, 2 Mon. 170; Hill. on New Trials, 175; *People v. Plummer*, 9 Cal. 299; *The State v. Groome*, 10 Iowa, 316; *People v. Gehr*, 8 Cal. 359.

As ground of challenge to an individual juror the law is: "Having formed or expressed an opinion as to the guilt or innocence of the defendant of the crime charged in the indictment, or any material fact to be tried, if it appear that such opinion would prejudice or bias the mind of the juror." Crim. Pr. Act, § 286, subd. 11.

The Constitution of the United States provides that the defendant shall be allowed an "impartial trial by a jury."

It is insisted by appellant that the juror Douglas had expressed an opinion before the trial, which would have disqualified him from being a juror in the cause, and been good ground for a challenge for cause, had he known the true state of facts.

It is, however, shown that the juror testified before the court that he had, at the time he was so examined, entirely forgotten his previous statements; that he had no opinion, bias or prejudice toward the defendant.

Does this change the case and so make him an impartial juror? Giving due weight to the two affidavits, considering the length of time between the homicide and the trial, about nine months, and viewing the sworn statement of the juror in the light laid down for prisoners who are allowed to testify in their own behalf, there can be no doubt that the preponderance of the evidence is on the side of appellant.

In the case of *United States v. Upham*, 2 Mon. 170, affidavits were filed to show that a juror, after being summoned to serve for the term, in speaking of the cases known as the "Indian Agency" cases, used such expressions as these, "If he found them the least guilty he would cinch them plenty," or "I am on the jury on those cases and will send up the defendants," etc.

By counter affidavits it was shown that these expressions were made in jest or sport, and that the juror did not know the defendants in the cause, and that he had no bias or prejudice in the case.

Upon an explanation of the case by the juror, the court say : "The present case being an Indian Agency case, or known as such, we do not perceive that the explanation at all impairs the force of the first affidavit ; and that affidavit unexplained would tend strongly to show that the jurymen was biased or prejudiced in the case, in which he afterward served as a jurymen.

"This the jurymen denied, but there is no disputing the fact that he had talked about the Indian Agency cases, and in such talk had evinced bias or prejudice generally in those cases, and there is nothing to exempt this case from its operation."

"We think, therefore, that the jurymen was incompetent to serve in the case, and for this reason alone reverse the judgment and remand the cause for a new trial."

Applying the above principles, and others consulted in this cause, we are of the opinion that Henry Douglas was not a competent and impartial juror ; and as to the question whether the court exceeded his duties in calling said juror and examining him on oath or not, we express no opinion, but conclude that, from all the showing in the cause, the juror did not show himself to be such a jurymen as is contemplated by the law. And for this reverse the judgment and remand the cause for a new trial.

*Judgment reversed and cause remanded.*

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SAVAGE ET AL., appellants, v. BURNS, respondent.

**CONTRACT — guaranty.** A. and B. became guarantors for C. on a bid to furnish supplies to a military post, by the terms of which they undertook that if the bid of C. was accepted, he would execute a contract with sufficient sureties to furnish the supplies advertised for at the terms bid, or in default thereof they would make good the difference between the bid of C. and that of the next lowest responsible bidder. C.'s bid was accepted but he failed to execute the contract. A. and B. when notified of the default without waiting for the contract to be awarded to the next lowest responsible bidder, undertook to carry it out on their own account, expended \$2,000 in the attempt and failed. After the expenditure, C. promised to repay them this amount. Failing to do so, A. and B. bring suit for the \$2,000, and set out the original contract of guaranty. *Held*, that C. was not liable to A. and B. for this sum under the terms of the guaranty, nor on his promise, which was without consideration

and void ; that A. and B. were still as much liable as ever under the original guaranty, and if compelled to pay thereon, they would have a good claim therefor against C., though he had repaid them the \$2,000 claimed in this suit.

*Appeal from First District, Custer County.*

STREVELL & GARLOCK and R. P. VIVION, for appellants.

The complaint charges fraud on defendant, and the demurrer admits it. A promise by a wrong-doer to pay damages for injury done is a good consideration. *Beadle v. Whitlock*, 64 Barb. 287 ; 1 Addison on Torts (Deasley & Baylies' ed.) 18 ; *Chester v. Dickinson*, 52 Barb. 49 ; *Turner v. Jones*, 1 Lans. 147 ; *Law v. East India Co.*, 4 Ves. 824 ; Cooley on Torts, 482.

If the demurrer was wrongfully sustained the order of release and discharge of bail given on arrest was wrong.

F. K. ARMSTRONG and SAM. WORD, for respondent.

Complaint shows that plaintiffs sue for money expended in trying to fill a contract they were not obliged to fill, and one that their principal had not entered into.

A surety must have actually paid money on this obligation before he can sue his principal. *Powell v. Smith*, 8 Johns. 249 ; *Hayden v. Cabot*, 17 Mass. 169.

A past consideration will not support a promise unless shown to have been done by previous request. *Chaffee v. Thomas*, 7 Cow. 395 ; *Bartholomew v. Jackson*, 20 Johns. 28 ; 7 id. 87 ; 6 Wend. 647 ; 3 Pick. 257 ; 15 id. 159 ; 1 Pars. on Cont. 391-468.

The claim implies no contract in such a case. Story on Cont. § 475, and references ; 10 Johns. 243 ; 14 id. 192-378.

There was no error in discharging defendant from arrest and releasing him. The complaint showed no facts to warrant an order of arrest. 10 Cal. 418 ; 6 id. 57.

The expenses incurred by plaintiffs were not required by their contract of guaranty and were of no value to defendant.

WADE, C. J. This is an appeal from a judgment in favor of respondent, rendered upon demurrer to the complaint.

It appears by the averments of the complaint, that the chief quartermaster of the department of the Platte, for and on behalf of the United States, at Omaha, in the State of Nebraska, advertised for sealed proposals for furnishing certain military supplies, to be delivered at Fort McKinney, in the Territory of Wyoming. The respondent proposed in a bid made by him to furnish such supplies at certain rates, and the appellants became guarantors for him to the effect that if the respondent's bid was accepted by the government, he would execute a contract with sufficient sureties, binding himself to furnish the articles proposed in conformity with the advertisement, and the terms of the bid, and in default that the guarantors, these appellants, would make good the difference between the offer and bid by the respondent, and the next lowest responsible bidder, or the person to whom the contract might be awarded. It is further averred that the bid of the respondent was accepted by the government, and that he was duly notified thereof, and the contract for furnishing such supplies was duly awarded to him, but that the respondent, conspiring to injure and defraud the appellants, and in consideration of a certain sum of money to him paid by certain persons to the appellants unknown, failed and refused to enter into and execute to the United States a written contract with good and approved security for furnishing such supplies, as by the terms of his bid or proposal he was bound to do, and thereupon notified the said chief quartermaster that he would not execute such contract to furnish security for the performance of the same. Thereupon the chief quartermaster notified the appellants, the guarantors upon such bid, of the action of the respondent in refusing to enter into such contract or to furnish security for the performance thereof, and that they must either enter into and perform such contract according to the terms of the respondent's bid, or be held to make good the difference between the bid of the respondent and that of the next lowest bidder. Thereupon the guarantors undertook to furnish such supplies according to the terms of the respondent's bid, and in so doing incurred an expense of about \$2,000, but after making a journey to Fort McKinney with teams, men and outfit preparatory to furnishing such supplies, gave up and

abandoned the undertaking, for the alleged reason that the supplies could not be had. It is further averred that the respondent being thereafter informed of this undertaking by his guarantors, and of the expense so incurred by them, promised to repay to them the amount of the same, but failing and neglecting so to do, they bring this action to recover the amount of such expenses.

1. The only question to be determined is, does the complaint state a cause of action against the respondent ?

By the terms of the guaranty accompanying the bid of the respondent, the appellants obligated themselves to cause the respondent to enter into a written contract with the government of the United States, with sufficient sureties, to furnish the supplies named according to the terms of the bid, and in default thereof, that they would make good the difference between the bid of the respondent and that of the next lowest responsible bidder, or the person to whom the contract might be awarded. This was the whole extent of their obligation. They were not required to enter into or perform the contract that the respondent had promised to execute and perform. But in case of a default on the part of their principal, they were held and required to make good to the government the difference named, and only this. Their acts in undertaking to fill the contract were not compelled. Such acts were not contemplated by the terms of their guaranty, and were wholly outside of it. Being a mere voluntary experiment on their part and outside of the terms of the guaranty, their principal is not liable for their acts. By the terms of the proposal the respondent had the right to refuse to enter into the contract, and he was given ten days in which to exercise the right, which was subject only to the penalty of paying the difference between his bid and that of the next lowest responsible bidder, in case of a refusal. What reasons operated upon the mind of the respondent to cause him to refuse to enter into the contract are immaterial so long as he had the right so to refuse. It does not appear how the appellants were or could have been defrauded by such refusal. The allegation of fraud is a mere conclusion, and wholly insufficient to put us upon inquiry as to its effect if it had been properly pleaded.

2. The payment of the \$2,000 having been made by the appellants for expenses incurred in a voluntary experiment of their own, not within the terms of the guaranty, it follows that the obligations of the guaranty remain unimpaired and in full force, and that these guarantors still remain liable to the government for the difference between the bid of the respondent and that of the next lowest bidder, and that if they should be compelled to pay the difference, they could then, and not till then, maintain an action against the respondent to recover the amount of the same. They have not been injured or damaged in consequence of their guaranty. They have not paid any thing whatever, because of their guaranty, and until they do so pay they cannot maintain an action against their principal. Liability to pay is not sufficient. They must actually pay before they can recover. Otherwise they might recover without paying, and never be compelled to do so. And if they could now recover this \$2,000 from the respondent, he would still be liable to them for the amount of the difference between the bids, in case they were compelled to pay such difference. And so it follows that the money sued for in this action is entirely foreign to the guaranty upon which the suit is founded, and which fixes the rights and obligations of the parties thereto. It also follows that the alleged promise of the respondent, made after the said expenses had been incurred, to pay the amount of the same to appellants, was a promise without consideration and void.

The consideration was past. The expenses had been incurred before the promise was made. The respondent did not request the appellants to undertake to fill the contract. He did not request them to incur any expenses. By the terms of the guaranty he had no reason to know or to suspect that they would undertake to fill the contract and furnish the supplies.

The complaint does not state a cause of action, and the demurrer thereto was properly sustained.

3. The complaint being insufficient, the order for the arrest of the respondent was illegal, and his discharge from arrest should follow as a matter of course upon the sustaining of the demurrer.

The judgment is affirmed with costs.

*Judgment affirmed.*



# INDEX.

## ACTION.

1. *Against delinquent executor — infant devisee.* Under the act of February 11, 1876, and section 280, page 366 of Codified Statutes of 1872, an action upon the bond of an executor by an infant devisee may properly be brought in the name of the Territory, to the use of the infant by his attorneys lawfully authorized. *Territory v. Cox*, 197.
2. ———. *Parties.* Any person interested is authorized to bring such action upon the bond of a delinquent executor, nor does it need the intervention of an administrator *de bonis non*, a settlement, and decree of distribution to authorize a devisee to maintain such an action, especially when it appears that such a devisee is the only person interested. *Ib.*
3. ———. *Statute of limitations.* Where letters of administration were revoked February 24, 1869, an action was begun in behalf of the infant devisee, February 4, 1876; the same is within the time limited by statute. A change in the parties to the action by substitution of attorneys of record for guardian *ad litem* is not the commencement of a new action so that the original one became barred by the statute. *Ib.*
4. *For diversion of water.* T. commenced this action July 16, 1875, to recover damages for the wrongful diversion of water by H. from April 21, 1870, until 1875. A judgment that T. was entitled to the use of the water had been entered April 21, 1870, in the court below, and H. appealed to this court and executed an undertaking to stay the execution of the judgment. This court affirmed the judgment, and H. appealed to the supreme court of the United States, and executed another undertaking to stay the execution of this judgment. The judgment was reaffirmed and a remittitur was issued from this court to the court below, January 8, 1875. *Held*, that every continuance of the wrongful diversion of the water by H. was a new cause of action. *Toombs v. Hornbuckle*, 193.
5. ———. *Statute of limitations.* *Held, also*, that, under the statute concerning limitations, T. could commence this action within three years after a cause of action accrued. *Ib.*
6. ———. *Undertaking on appeal.* *Held, also*, that the undertakings on the appeals affected the subject of the original case, but did not restrict the right of T. to bring an action for the wrongful diversion of the water during the pendency of the appeals. *Ib.*
7. ———. *Damages.* *Held, also*, that T. cannot recover any damages on account of the water which was diverted by H. more than three years before July 16, 1875. *Ib.*

## ACCOMPLICE.

*Corroboration.* See CRIMINAL LAW, 50, 112.

## ADJOURNMENT.

In the absence of any statute to the contrary, the district courts of the Territory have power to adjourn from time to time, though such adjournment should carry such term beyond the time fixed for holding court in another county in the same district. *Higley v. Gilmer*, 90; *Mayne v. Creighton*, 108; *Roudebush v. Ray*, 188.

## ADVERSE POSSESSION.

1. In 1872 A. bought of B. a dwelling-house and other buildings which were upon a mill-site of C., a foreign corporation. C. received a patent thereto from the United States in 1869. Afterward A. inclosed these improvements with a good and substantial fence in 1872, and resided on said tract without interruption until April, 1876, when the agent of C. asserted its title to the premises and demanded rent therefor. A. testified on the trial that she always claimed to be the owner of the property, and the agent testified that he did not know that she so claimed it until April, 1876, but knew that she built the fence and occupied the premises from 1872 until October 1, 1876, when C. commenced this action. *Held*, that the possession of the tract inclosed by A.'s fence was adverse to the rights of C. *National Mining Co. v. Powers*, 344.
2. ———. *Evidence — declaration of A.'s grantor.* Upon the trial C. offered to prove by B. that he told A. at the time of the sale in 1872, that he had no interest in the land and could sell the buildings only; that C. owned the land and the buildings had been erected by permission of C.'s agent. *Held*, that this testimony did not affect the legal relations of A. and C. after the erection of the fence, and was therefore inadmissible. *Ib.*
3. *Of placer mines.* A. possessed ten years a lot of land in Oro Fino gulch and had an arastra thereon. B. located in 1877 a placer mining claim in the gulch which included A.'s property, and filed his application in the land office to obtain a patent thereto from the United States. A. filed in the office an adverse claim to said lot. The gulch was returned by the official surveyors as mineral land, and it had been mined to one point about one thousand feet above, and another point about two thousand feet below the arastra. There was no testimony showing that the intermediate three thousand feet of the gulch contained any metals, and it did not appear that the channel passed through A.'s lot. *Held*, that A. is an adverse claimant under the acts of congress relating to placer mining claims, and that B. is not entitled to the patent to the land in A.'s possession. *Shafer v. Constans*, 369.

## AGENCY.

1. *Agent authorized to draw bill of exchange in his name cannot draw in name of principal.* The president of the Hope Mining Company sent the following telegram from St. Louis, Mo., February 23, 1874: "To Joseph Alger, Philipsburg. Care for company's property. See that McArdle has what he needs. If funds needed, draw on company. CHAS. C. WHITTLESEY." McArdle died before the message was delivered. A bill of exchange for \$500 was drawn March 26, 1874, and signed "Hope Mining Co. by JOS. M. ALGER," which was discounted by the First National Bank of Deer Lodge and paid by the company. A similar bill for \$1,000 was drawn May 18, 1874, and discounted by the bank, which was not paid by the company, and the bank brought this action thereon. The officers of the bank made no inquiries relating to the authority of Alger and did not see the telegram. From March 26, 1874, to about May 18, 1874, Alger checked against certain money of the company which was deposited in Deer Lodge and Helena, in this Territory. *Held*, that the telegram authorized Alger to draw on the company in his own name for money for a particular purpose, and that it did not authorize him to sign the name of the company to the bills. *Held, also*, that the payment of the checks and the first bill by the company did not estop the company from disputing the right of Alger to draw the second bill. *Held, also*, that the bill in controversy can be treated by the holder as an accepted bill or a promissory note, that Alger had no authority to make such an instrument, and that the company was not bound to pay the same. *Bank of Deer Lodge v. Hope Mining Company*, 146.

AGENCY — Continued.

2. *Ratification.* The act of an unauthorized agent only becomes the act of the principal after ratification upon full knowledge, so far as the intervening rights of third persons are concerned. *Schnepel v. Mellen*, 118.

AMENDMENT.

See PLEADING, 442, 459.

APPEAL.

1. *Effect on judgment.* An appeal to the supreme court does not suspend the operation of a judgment, so that it may not be plead as a bar in another case pending between the same parties in interest concerning the same subject-matter. *Fredericks v. Clark*, 258.
  2. *Objections on.* Only such objections will be considered by the appellate court as were raised in the court below. *Territory v. McAndrews*, 158.
  3. ——— Alleged errors in giving or refusing instructions will only be considered by the appellate court when evidence showing their applicability is properly embraced in the record. *Ib.*
  4. *Effect of.* The operation of a judgment and decree is not suspended by an appeal to the supreme court of the United States, where there is no *superseas* or stay of execution so that it may not be set up as a bar to a retrial of the same issues between the parties. The same judgment binds the parties as to every question directly decided. *Curtis v. Donnell*, 211.
- Correction of statement on.* See PRACTICE, 357.  
*Frivolous, damages for.* See FORECLOSURE, 372.  
 See PRACTICE, 472.

ARGUMENT.

See CRIMINAL LAW, 50.

ARREST OF JUDGMENT.

See CRIMINAL LAW, 50.

AUTHENTICATION.

- Of official character by deputy.* The certificate of a deputy county recorder to the official character of an acting justice of the peace, taking a deposition under a commission with a general power to any acting justice to execute the same, must be tested by the laws of the Territory where taken, and so tried is as good as if made by the recorder in person. *Fredericks v. Davis*, 251.

BOND.

1. *County treasurer's.* An official bond voluntarily entered into by a county treasurer, with sureties for the faithful performance of his duties, and to save the county harmless in his discharge of the same, though erroneously given to the Territory instead of the county commissioners as required by law, is good and binding as a common-law bond. *Commissioners of Jefferson County v. Lineberger*, 231.
2. ———. *Defenses.* It is no defense to an action upon said bond brought to recover the penalty thereof for breach of conditions, to allege in answer that the office and safe furnished by the county were broken open and robbed without any want of reasonable care on the part of the treasurer, and to strike such a defense from the answer would not be error. Neither is it a proper defense to such an action to allege that the commissioners compromised and settled the claim of the county, accepting part

## BOND — Continued.

of the moneys due, and in consideration thereof releasing the treasurer and his sureties from liability for the balance. Such defense should be stricken from the answer, and all evidence of such a compromise or settlement was properly excluded from the consideration of the jury. It is not in the power of the county commissioners to compromise such a claim. Their only duty is to prosecute the delinquent official and his sureties. There could be no legal consideration for such an agreement, and neither parol nor record evidence thereof would be received. *Ib.*

*County treasurer's.* See SURETY, 60.

## BURGLARY.

See CRIMINAL LAW, 440.

## CASES AFFIRMED, OVERRULED, OR CRITICISED.

*Allport v. Kelley*, 2 Mon. 343, and *Chumaseo v. Vial*, *ante*, 376, holding that this court will not review the evidence to determine questions of fact, when there is no motion for a new trial, and that the judgment will be allowed to stand if it does not conflict with the findings, affirmed. *Largey v. Sedman*, 472.

*Boley v. Griswold*, 2 Mon. 447, holding that equity will not afford relief to a party who has been negligent in obtaining a legal remedy, affirmed. *Vantilburg v. Black*, 459.

*Chumaseo v. Potts*, 2 Mon. 242, considered. *Territory ex rel. Tanner v. Potts*, 364.

*Commonwealth v. Webster*, considered and approved. *Territory v. McAndrews*, 158.

*Caruthers v. Pemberton*, 1 Mon. 111; *Harris v. Shontz*, *id.* 212; *Toombs v. Hornbuckle*, *id.* 286; *Columbia M. Co. v. Holter*, *id.* 296; *Gallagher v. Basey*, *id.* 457, and *Barkley v. Tieleke*, 2 *id.* 59, commented on and their sufficiency affirmed. *Fabian v. Collins*, 215.

*Dodge v. Freedmen's Saving and Trust Co.*, 3 Otto, 379, followed. *Shober v. Jack*, 351.

*Hale v. Park Ditch Co.*, 2 Mon. 498, holding that the twenty-sixth rule of this court is not applicable when the judge settles the statement on appeal according to his recollection of the evidence, affirmed. *Largey v. Sedman*, 357.

*Herbert v. King*, 1 Mon. 475, holding that the principal is responsible for the acts of his agent while acting within the scope of his authority, and that courts will not enlarge this liability, affirmed. *Bank of Deer Lodge v. Hope Mining Co.*, 147.

*Kinna v. Horn*, 1 Mon. 597, holding that an exception should be saved to the action of the court when the conduct of an attorney is complained of, affirmed. *Higley v. Gilmer*, 433.

*Ming v. Truett*, 1 Mon. 322, approved. *Ervin v. Collier*, 189.

*Morse v. Swan*, 2 Mon. 306, approved. *Ervin v. Collier*, 189.

*Territory v. Stears*, 2 Mon. 325, as to sufficiency of indictment, affirmed. *Territory v. McAndrews*, 158.

*Territory ex rel. Blake v. Virginia Road Co.*, 2 Mon. 96, affirmed. *Gillette v. Hubbard*, 412.

*Wiebbold v. Hermann*, 2 Mon. 609, considered and affirmed. *Curtis v. Valiton*, 153.

*Wormall v. Rems*, 1 Mon. 630, and *Hartley v. Preston*, 2 *id.* 415, considered and reaffirmed. *Hershfield v. Aiken*, 442.

## CERTIFICATE.

See AUTHENTICATION, 251.

## CHALLENGE.

See CRIMINAL LAW, 454.

## COMMON CARRIER.

*Of passengers — degree of care — trespasser.* While common carriers of passengers for hire are held to the exercise of the highest degree of care, skill and diligence toward passengers who pay their fare, that a reasonable and skillful man can provide, ordinary care only is required toward deadheads and trespassers. *Higley v. Gilmer*, 90; *Mayne v. Creighton*, 108.

## CONFIDENTIAL COMMUNICATIONS.

See CRIMINAL LAW, 50.

## CONSIDERATION.

See STATUTE OF FRAUDS, 419.

## CONSTITUTIONAL LAW.

1. *Right of speedy trial.* The speedy trial to which a person charged with crime is entitled under the Constitution is a trial at such a time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial, and in such case a party confined, upon application by *habeas corpus*, is entitled to discharge from custody. *United States v. Fox*, 512.
2. *Statute of limitations — effect on causes of action existing at the time of its passage — effect on the remedy.* When a cause of action has arisen under a given limitation act the same becomes a rule of property. Limitation acts cannot have a retrospective action, else they would interfere with vested rights of property. If before the expiration of the period of limitation existing when a cause of action arose, a new statute is enacted providing a different period, the effect thereof, when there are no express words to the contrary, is to give a new lease of life to such cause of action for the period provided in the new act, and not till the expiration of such period can the new act be pleaded in bar. *Gillette v. Hibbard*, 412.

## CONTRACT.

*Construction — statements of signer — resources of water ditch.* A. signed and delivered to B. and C., September 16, 1874, an instrument, by which he agreed to pay two promissory notes made by A., B. and C. to D., as soon as he collected for the Park Ditch Company a certain promissory note, a claim and "other demands due it," or received "from any sources whatever of the Park Ditch Company" "any other sums." A. claimed that he had not collected or received any sums on account of the Park Ditch Company, and B. and C. paid two-thirds of the amount due upon the notes to D., and brought this action to recover what had been so paid. Upon the trial the instrument was read in evidence, and B. and C. offered to prove that A., in 1875, received \$3,000 from the sale of the water of the Park Ditch Company, and that A. said to B. and C., when he delivered the instrument, that "from any resources whatever" included receipts from the sale of said water. The court excluded the testimony, and B.

## CONTRACT — Continued.

and C. were nonsuited. *Held*, that, according to the terms of the instrument, the sale of the water in 1875 was included in the resources of the Park Ditch Company, and that the evidence should have been admitted. *Held*, also, that the recitals of the instrument may be referred to for the purpose of ascertaining the situation of the parties thereto. *Ming v. Woolfolk*, 380.

## COSTS.

*On appeal — when judgment is modified.* The appellant did not ask the court below to modify the judgment, and this court modified the same, upon its own motion, by prescribing the manner of satisfying it. *Held*, that the appellant cannot recover his costs of appeal. *Knox v. Gerhauser*, 267.

## COUNTER-CLAIM.

*Judgment for.* See PRACTICE, 480; PLEADING, 142.

## CRIMINAL LAW.

1. *Competency of juror — opinion and prejudice.* A. testified in April, 1880, upon his examination respecting his qualifications to serve as a trial juror in a criminal case, that he had not formed or expressed any opinion as to the guilt or innocence of the defendant. He was accepted as a juror. After the verdict had been returned, it was proved that A. had stated before the trial in June, 1879, that the defendant was guilty and that he would hang him. A. then testified that he had forgotten these statements, and that he had no prejudice against the defendant when he was sworn to try the cause. *Held*, that A. was not a competent juror under the laws of this Territory. *Territory v. Kennedy*, 520.
2. *Evidence to prove sodomy.* Upon the trial of A., indicted for committing the crime of sodomy with B. in Deer Lodge, on November 9, 1877, B. testified to the commission of the offense by A. with him on November 9, 1877, at Deer Lodge, and also on other days before this date. The officer who arrested A. testified that he informed him he had been arrested on the complaint of B., and that A. then said it would be one of the most interesting cases ever in court, and that B. was a boy prostitute. A brother of B. testified that A. came to his house about a mile from Deer Lodge, on the afternoon of November 9, 1877, and wanted B. to go to Deer Lodge to get wages which A. owed him, and that B. went away with A. and did not return until the next day. The clerk of a hotel in Deer Lodge testified that A. and B. went to bed in a room which he showed them, November 9, 1877. A. testified in his defense that he paid B. what he owed him, November 9, 1877; that they slept together at the said hotel; that he paid for the bed, and that he had nothing to do with B. of a criminal nature. *Held*, that the testimony for the Territory was properly submitted to the jury to prove the offense. *Territory v. Mahaffey*, 112.
3. ———. *Corroboration of accomplice.* *Held*, also, that B. was an accomplice, and that his testimony was corroborated by other evidence tending to connect A. with the commission of the offense, or the circumstances thereof. *Ib.*
4. *Evidence — murder — proof of premeditation.* Under the statute of Montana it is not necessary to allege or prove premeditation when the facts show that the murder was committed for purposes of robbery. *Territory v. McAndrews*, 158.
5. *Burden of proof.* After the fact of killing is proved, the burden of proof is upon the accused to show circumstances of mitigation or justification. *Ib.*
6. *Indictment — one offense.* An indictment under our statute must charge but one offense. *Territory v. Fox*, 440.

## CRIMINAL LAW — Continued.

7. *Indictment—burglary.* Burglary, as defined by our statute, is but of one kind, and has no degrees. To charge any other offense with it in the same indictment is error. *Ib.*
8. *Jurisdiction of grand jury.* The district courts have jurisdiction of every crime known to our laws. The jurisdiction of the grand jury is co-extensive. *Territory v. Corbett*, 50.
9. *Construction of statute—fornication.* Section 146 of the Criminal Laws, under which the indictment in this case was drawn, creates no specific crime of fornication nor does it cover the case of living in a state of open fornication, which was constituted a crime by the first legislature of Montana, but it covers any act of sexual intercourse between persons related within certain prohibited degrees. *Ib.*
10. *Variance.* A public offense need not be charged in the exact words of the statute; the meaning must be preserved. *Ib.*
11. *Surplusage.* It is sufficient if the statute offense is covered by a part of the charge—the rest may be rejected as surplusage. *Ib.*
12. *Marriages—prohibited—incestuous.* Marriages between parties prohibited by law from inter-marrying are necessarily incestuous and void. Any act of sexual intercourse between parties so related is within the terms of the law describing it as fornication or adultery. *Ib.*
13. *Witnesses—accomplice.* An accomplice is a competent witness in this Territory. Neither the consent of the partner in crime nor permission of court is necessary. Neither is it necessary that the charge against the accomplice be first dismissed. *Ib.*
14. ———. *Corroboration.* The testimony of an accomplice need not be corroborated on every item. Failure of this is not ground for a new trial. *Ib.*
15. *Arguments of counsel.* It is discretionary with the court to hear argument of counsel. If satisfied it is not error to decline to hear it. *Ib.*
16. *Instructions.* It is not error in a court to refuse instructions that do not state correctly the law of the case, or that have already been covered by instructions given. *Ib.*
17. *Confidential communications—physicians.* The consent of the patient only is necessary to render competent the testimony of physicians touching matters of information acquired in attending such patient in his professional capacity and which were necessary for them to know to enable them to prescribe or act for the patient. Codified Statutes, 125, § 450. In the present case the communications do not come within the specified exemptions and no consent was necessary. *Ib.*
18. *Witnesses—names indorsed on indictment.* Our statutes do not require that the names of all the witnesses for the Territory should be indorsed on the indictment. Codified Statutes, 214, § 157. *Ib.*
19. *Motions for new trial and in arrest of judgment.* The motion for a new trial should be made before judgment is entered, but the hearing thereon may occur afterward. That in arrest of judgment must be made and heard before judgment is entered. If made afterward the court may, without error, disregard or overrule it. *Ib.*
20. *Reasonable doubt.* A reasonable doubt is such an one, that before a juror should find a defendant guilty of crime, he ought to be so convinced of his guilt by the evidence as that he would be willing to act upon such conviction in matters of the highest interest and greatest concern to himself. So long as moral certainty is not reached, a reasonable doubt may be said to remain on the mind. This degree of moral certainty is required in criminal cases. *Territory v. Owings*, 187.
21. *Contradictory instructions.* Instructions admitting a lower degree of doubt, or that are contradictory and irreconcilable, furnish good ground for reversal. *Ib.*
22. *Recognizance in justice's court where no written complaint has been made is void.* A justice of the peace in open court verbally ordered the sheriff

## CRIMINAL LAW — Continued.

to arrest A. for two attempts to bribe him, and then verbally notified A. of the charges, but no complaint in writing was ever made. A. confessed his guilt and judgment was rendered that he be committed to jail to be held to appear at the following term of the district court, and his bail was fixed at \$5,000. A recognizance was executed and A. was discharged from custody. An indictment was found by the grand jury and A. failed to appear, and his default and that of the sureties were entered, and this action was brought on the recognizance. *Held*, that the filing of a written complaint describing the offense of A. was necessary to give the justice's court jurisdiction to require the recognizance, and that the recognizance is void. *Held, also*, that the sureties as well as A., the principal, can plead the defense of duress and want of jurisdiction. *Deer Lodge County v. At*, 168.

23. *Right of challenge to a grand jury.* The right of challenge to the grand jury is a substantial right provided by statute for every one held to answer for an offense which is submitted to the investigation of such jury, and where, from any cause, the accused is deprived of this right without its being waived, expressly or by implication, it is good cause for setting aside an indictment. *Territory v. Ingersoll*, 454.

## DAMAGES.

*Measure of.* When goods are attached and sold by the sheriff the proper measure of damages is the value of the goods at the time of the attachment, and not what they brought at auction. *Randall v. Greenwood*, 506.

*In action for malicious prosecution.* See PLEADING, 109.  
*For frivolous appeal.* See FORECLOSURE, 372.

## DECREE.

1. *Presumption of validity.* A decree of the district court will be presumed to be supported by every thing necessary to its validity until the contrary appears by averment and proof. *Stafford v. Hornbuckle*, 485.
2. *Construing.* By a former decree of court rendered in the case of *Gallagher v. Basey*, 1 Mon. 457, and 20 Wall. 670, the plaintiff in this action was decreed entitled to 35 inches of water at the head of his ditch, and then to make good this amount it required that defendant should allow 125 inches of water to flow past the head of their ditch. *Held*, that the plaintiff by this decree was entitled to the full amount of 125 inches of water at the head of defendants' ditch, and that if by any means he could save it from waste or sinking, he was entitled to the benefits thereof, and that defendants had no cause or right to complain. *Id.*

## DEDICATION.

*Of street.* See TOWN SITE, 32.

## EQUITY PROCEEDINGS.

*Findings of chancellor — presumptions of law.* The finding of the chancellor, "That the equities of the cause are with the plaintiff," is equivalent to finding every material fact for plaintiff, and the same would be presumed from a judgment given for plaintiff unless the contrary appeared. *Ervin v. Collier*, 189.

## ESTOPPEL.

1. *By record.* To be able to plead a judgment in estoppel it must appear that precisely the same point was in issue at a former trial. A party is

**ESTOPPEL — Continued.**

- estopped only by a title that he put in issue in a litigation, or that he might have so put in issue. *Mayendorf v. Frohner*, 282.
2. *In pais*. To constitute estoppel *in pais* the answer should allege that the false representations were made with intent that the opposite party should act upon the same. *Ib*.
  3. *Outstanding title — location — purchase*. A party ousted of possession under one title is not estopped from purchasing another outstanding title subsequent to the first action, and asserting his right thereunder. Acquiring mining ground by location is procuring such right by purchase. *Ib*.
  4. *Subsequently-acquired title — to whom it inures*. A subsequently-acquired title only inures to the benefit of a purchaser from the party who so acquires the same, and not of one who has acquired possession and title by judgment. *Ib*.
  5. *Silence*. When there is no estoppel pleaded and no fraud alleged, the deed must speak for itself; mere silence does not work an estoppel, in absence of fraud. *Stafford v. Hornbuckle*, 485.  
See WATER, 215; PLEADING, 215.

**EVIDENCE.**

1. *Interest does not exclude witness—exceptions to this general rule*. Section 444 of the Civ. Pr. Act of Montana, 1872, changes the common-law rule and allows any party to be a witness notwithstanding his interest in the result of an action. Section 445 of the same act limits this general rule, leaving it to stand as at the common law, where the adverse party is the representative of a deceased person, and the facts to be proven transpired during the life of such deceased person. *Shober v. Jack*, 351.
2. *Competency of witness*. It is never presumed that a witness is incompetent. The one objecting must show why or wherein the witness is incompetent. Nothing appearing to show that a witness was incompetent, his exclusion was error. *Ib*.
3. *Cross-examination*. The range of proper cross-examination must be confined to points affecting the credibility of a witness. *Ib*.
4. ———. A defendant may not be allowed to make out his own case by cross-examination of plaintiff's witnesses unless the examination in chief has opened the door. *Fredericks v. Clark*, 258.
5. ———. *Refused on matters afterward offered as rebuttal*. Upon the trial, the court refused to allow B., upon the cross-examination of A., to inquire concerning some matters which had not been testified about and were afterward offered in rebuttal by A. The evidence was not before this court for examination, and the effect of this ruling on B.'s rights could not be determined. *Held*, that it does not appear that the court below abused its discretion in directing the order of proof, and that this ruling does not entitle B. to a new trial. *Higley v. Gilmer*, 90.
6. *Expert in freighting business*. A. brought this action against B. to recover an account for transporting merchandise by his ox train from Fort Peck to the old Crow Agency. Upon the trial, A. testified concerning the reasonable value of this transportation. The transcript does not show that A. had any knowledge of the freighting business, or the rates usually charged therein, or the topography of the country between Fort Peck and the Crow Agency, or any other fact that would qualify him to testify as an expert. *Held*, that A. was not a competent witness to give an opinion upon this question. *Story v. MacLay*, 480.
7. *Competent witness to draw map*. Upon the trial, A. prepared a sketch of the country including Fort Peck, Fort Belknap and the Crow Agency and explained the same to the jury. The transcript does not show that the sketch was correct, or that A. had any knowledge of this region, and the sketch was not authenticated. *Held*, that the sketch was not competent evidence. *Ib*.

## EVIDENCE — Continued.

8. *District records.* When the original record books of a mining district are proved to have been lost, a copy of such records, made by a deputy recorder, under a law requiring district records to be filed in the county recorder's office, in a book which has been recognized by usage and preserved in the recorder's office, is better evidence of location appearing therein than the bare memory of witnesses, and the best that the nature of the case admits. *Belk v. Meagher*, 65.
  9. *Witnesses to a deed — acknowledgment — certificate.* Under the statute of Montana pertaining to conveyances, no subscribing witnesses are required to a deed, when the same is properly acknowledged. A deed may be entitled to record by proof of witnesses without acknowledgment. When by either method it is once recorded, it is good notice to third parties. *Ib.*
  10. *Negligence — former accidents.* Evidence of former accidents occurring under same driver is admissible to prove bad nature of roads or want of familiarity with them, but not as proof of negligence of driver at the time of the accident. *Higley v. Gilmer*, 90; *Mayne v. Creighton*, 108.
  11. *Oral declarations.* When title is attempted to be proved by oral declarations of the grantors, it may be shown in rebuttal that those grantors made different and contradictory statements, and this is not in conflict with the rule that declarations of grantor in disparagement of his title are inadmissible. *Stafford v. Hornbuckle*, 485.
  12. *Rebuttal.* It is not such an error as to warrant a reversal of a judgment that evidence was allowed in rebuttal which should have been given in chief, when an opportunity was given by the court to produce testimony in contradiction. *Ib.*
  13. *Effect of immaterial evidence.* A judgment will not be reversed because of the admission even of improper testimony when it is clear that it involves no injury to the party appealing. *Ib.*
  14. *Exceptions — sufficiency — time.* An objection to evidence on the general ground of incompetency is sufficiently explicit, if such evidence would not be competent in any phase of the case. It is sufficient in point of time if the record shows the objection was made at the time of the trial. *Shober v. Jack*, 351.
- See ADVERSE POSSESSION, 344; CRIMINAL LAW, 50; FORCIBLE ENTRY AND DETAINER 387; NEGOTIABLE INSTRUMENT, 351; WITNESS, 262.

## EXCEPTION.

See PRACTICE.

## EXTRADITION.

See STATUTORY CONSTRUCTION, 364.

## FINDINGS.

See PRACTICE.

## FORCIBLE ENTRY AND DETAINER.

1. *Title cannot be shown.* In an action brought under the statutes of Montana for forcible entry and unlawful detainer, the defendant cannot be permitted to show title in himself, or to disprove the title of plaintiff. This action was not designed to supersede that of ejectment. The decisions under the differently worded statute of California are inapplicable in Montana. *Boardman v. Thompson*, 387.
2. *Lawful entry.* An entry by law is only given after an adjudication by a court, and judgment awarding possession. *Ib.*

**FORCIBLE ENTRY AND DETAINER — Continued.**

3. *Possession by consent.* The law requires one whole year's quiet possession by defendant to bar plaintiff's action under the statute, and consent will not be presumed from the plaintiff's silence for any shorter period. *Ib.*
4. *Practice.* Where the transcript fails to give the full evidence adduced on the trial, this court will presume that plaintiff's possession was satisfactorily proved to support the judgment rendered in the court below, though the evidence included in the transcript presented is insufficient for the purpose. *Ib.*
5. *Evidence.* Evidence of staking a claim in this action is competent to show the extent of plaintiff's possession, on the same grounds as a deed would have been to show boundaries. *Ib.*

**FORECLOSURE.**

1. *Reasonable attorney fee—damages.* In an action in chancery to foreclose a mortgage, which provided, in case of default in payment, for recovery of reasonable attorney's fees, and the complaint demanded for such fees ten per cent on the amount of the claim secured, and the answer neither denied the contract nor the reasonableness of the demand, and the court submitted to the jury for a special finding simply how much was due on the note secured by the mortgage, without objection of defendants or request for submitting any other issue, and the court, after receiving and approving the finding of the jury, heard evidence on the matter of attorney fees, to which defendants objected, and rendered its decree for the amount due on the note and ten per cent thereon for attorney fees. *Held*, that it was in the discretion of the judge sitting as chancellor to submit special findings to the jury, and that it was not error to hear proof as to the reasonable value of attorney's services after the findings of the jury had been returned into court, to render judgment thereon and include the same in the final decree. *Clark v. Nichols*, 372.
2. *Frivolous appeal—damages for.* Such action of the court furnished no ground for exception. An appeal based thereon must be regarded as frivolous and for delay only, and as properly calling for the imposition of damages as provided by statute. *Ib.*

**FORNICATION.**

See CRIMINAL LAW, 50.

**FRAUD.**

1. *In procuring a patent—who may attack.* Where fraud has been practiced in procuring a patent from the United States, only the United States can attack such patent. *Meyendorf v. Frohner*, 282.
2. *Relocation of mining ground.* A party in possession of mining ground under a title subsequently determined in court as invalid, may, without fraud, relocate such ground and thereafter perfect such title in accordance with the United States laws. *Ib.*
3. *Equity—trusts and cestui que trust.* A party must first show himself entitled to a patent from the United States upon his equitable title before he can have another, who has secured a patent title by alleged fraudulent means, adjudged a trustee of such title for his use. *Ib.*

**FRAUDULENT CONVEYANCE.**

1. *Estoppel.* The grantor in an alleged fraudulent conveyance, with a full knowledge of the facts, is estopped from testifying, against his own warranty of title, that the same is fraudulent and void. *Fredericks v. Davis*, 251.

**FRAUDULENT CONVEYANCE** — Continued.

2. *Mutuality*. To render a conveyance fraudulent as against creditors, there must be mutual participation in the fraudulent intent on the part of both grantor and grantee. *Curtis v. Valiton*, 153.

**GRAND JURY.**

See **CRIMINAL LAW**, 454.

**GUARANTY.**

- A. and B. became guarantors for C. on a bid to furnish supplies to a military post, by the terms of which they undertook that if the bid of C. was accepted, he would execute a contract with sufficient sureties to furnish the supplies advertised for at the terms bid, or in default thereof they would make good the difference between the bid of C. and that of the next lowest responsible bidder. C.'s bid was accepted but he failed to execute the contract. A. and B. when notified of the default, without waiting for the contract to be awarded to the next lowest responsible bidder, undertook to carry it out on their own account, expended \$2,000 in the attempt and failed. After the expenditure, C. promised to repay them this amount. Failing to do so, A. and B. bring suit for the \$2,000, and set out the original contract of guaranty. *Held*, that C. was not liable to A. and B. for this sum under the terms of the guaranty, nor on his promise, which was without consideration and void; that A. and B. were still as much liable as ever under the original guaranty, and if compelled to pay thereon, they would have a good claim therefor against C., though he had repaid them the \$2,000 claimed in this suit. *Savage v. Burns*, 527.

**HABEAS CORPUS.**

See **STATUTORY CONSTRUCTION**, 426.

**HANDWRITING.**

See **WITNESS**, 262.

**INDICTMENT.**

See **CRIMINAL LAW**, 440.

**INDORSEMENT.**

*Witnesses' names on indictment*. See **CRIMINAL LAW**, 50.

**INSTRUCTIONS.**

*Explained*. One of the instructions complained of was in these words: "If it is admitted in the pleadings or proved to your satisfaction that the legal title to this water is in the plaintiff, the defendants to maintain their defense must show their equitable title, and that the plaintiff is trustee for them, by a preponderance of evidence." Such an instruction was proper to inform the jury that the same quantity of proof was necessary to establish the equitable title of defendants whether the legal title of plaintiff was admitted or proved, it was not leaving to the jury to say what was admitted by the pleadings. *Stafford v. Hornbuckle*, 485.

See **CRIMINAL LAW**, 50, 137; **TRIAL**, 90, 108.

## INTEREST.

1. *Compound*. Where a new note is given to take up former notes on which compound interest has been computed and included, *held*, that the new note is void only to the extent of such compound interest included. *Curtis v. Valiton*, 153.
2. *On unliquidated demands — depends upon statute*. Interest is not allowed by the statute of Montana on unliquidated demands before judgment. If, contrary to statute, a jury has allowed such interest and it has been included in the judgment, it must be stricken out before the same is affirmed. *Randall v. Greenwood*, 506.
3. *Vexatious and unreasonable delay*. The case of a county official refusing to pay over the moneys of the county upon proper demand, and compelling the institution of suit to recover the same, is such an unreasonable and vexatious delay contemplated by the statute, as to entitle the county to recover interest on the same. *Commissioners of Jefferson County v. Lineberger*, 231.
4. *Rate*. Interest on a note after due must be computed at the statutory rate of ten per cent per annum, unless the note contains a special provision that the higher rate shall be paid after or before due. *Gillette v. Hibbard*, 412.

## JOINDER.

See PLEADING, 208.

## JUDICIAL SALE.

1. *Proceeds, when void*. On the first appeal this court decided that B. had in his hands \$107.76, which should have been paid to A., if the sale of A.'s property under B.'s mortgage had been confirmed. Upon that hearing, A. maintained that the sale was void and this court so held. On the second trial, the court below affirmed the report of a referee finding that this sum with interest thereon was due from B. to A. *Held*, that A. was not entitled to any part of the proceeds of the sale in this action. *Roush v. Fort*, 175.
2. *Title of a purchaser*. C. was the purchaser at a sale of mineral land by the sheriff under an execution against V. The court found that V. was holding the legal title in trust for T. at the time of the sale, but that V. had no interest when this action was commenced. *Held*, that the rule of *caveat emptor* applies to sales under execution, and that C. had no title to the property. *Chumasero v. Vial*, 376.

## JUDGMENT.

- In gold coin or its value*. The jury assessed the damages of A. at \$743 in gold coin of the United States, or \$757.86 in legal tender treasury notes of the United States, the equivalent of the gold coin. The judgment was entered for the last-named sum. *Held*, that the judgment does not follow the verdict, and that the judgment should fix the amount to be paid, if paid in gold coin, and the amount to be paid, if paid in said legal tenders. *Knox v. Gerhauser*, 267.

## JURISDICTION.

1. *Service of summons — subpoena in chancery*. This action was brought in the district court to obtain the dissolution of a copartnership, and the parties were residents of the Territory. A complaint was filed and the clerk issued a legal summons and a subpoena in chancery, which were served by the United States marshal for Montana Territory. *Held*, that the marshal was not the proper officer to serve the summons. *Held, also*, that the subpoena in chancery was not a summons within the terms of the

## JURISDICTION — Continued.

- Civil Practice Act. *Held, further*, that the district court did not acquire jurisdiction of the defendant by these proceedings. *Black v. Clendenin*, 44.
2. *Objections not waived by answer and trial.* The defendant appeared specially and moved to set aside the proceedings under the summons and subpoena, and excepted to the action of the court in overruling his motion; afterward he filed an answer and proceeded to a trial upon the merits. *Held*, that the defendant did not waive his objections to the jurisdiction of the court. *Ib.*
  4. *Pleadings.* Before an attaching creditor can assail the title of a third party in possession of the attached property, claiming ownership, the pleadings must show that the attachment was issued by a court having jurisdiction, and upon a proper and sufficient affidavit. The want of such showing is a fatal defect, and the refusal of the court below to allow the filing of such a pleading, after the evidence had been submitted to the court, was no error. *Hootman v. Bray*, 409.

## JUROR.

See CRIMINAL LAW, 520.

## JURY.

*Grand.* See CRIMINAL LAW, 454; TRIAL, 206.

## LICENSE.

See STATUTORY CONSTRUCTION, 248.

## LOCATION.

1. *Of quartz lodes.* The Russell lode was located prior to May 10, 1872, and the record title was in A. a number of years before July 21, 1877. A. performed work eighteen days on the property, between December 7, 1875, and December 17, 1875, and did no more work thereon until July 19, 1877. B. relocated this lode July 3, 1877, under the name of the Empire lode by posting his notice of location on a stake at the discovery shaft of the Russell lode. A. entered upon the lode July 19, 1877, and worked about one hour, when B. run the lines of the Empire lode, and cut and placed thereon four corner stakes. The notice of B.'s location was recorded July 20, 1877. *Held*, that the act of B. in placing the notice on said stake did not constitute a location of the lode, under the laws of the United States. *Gonu v. Russell*, 358.
2. *Forfeiture.* *Held, also*, that A. had the right to resume work on the Russell lode at said time and thereby defeat a forfeiture of his title. *Ib.*
3. *Resumption of work.* *Held, further*, that the acts of B., after the resumption of work by A., did not impair A.'s rights to the Russell lode. *Ib.*

## MANDAMUS.

1. *Not a civil action — parties.* A proceeding in mandamus is not a civil action under our Code of Procedure, with individual parties plaintiff and defendant. The action should be brought in the name of the Territory at the relation of the party beneficially interested. *Territory ex rel. Tanner v. Potts*, 364.
2. *Statute of limitations — due diligence.* Though the Statute of Limitations only applies in express terms to civil actions, and the issuance of a writ of mandate rests in the discretion of the court, yet courts in exercising that discretion will be guided by the bearing of that statute, upon anal-

**MANDAMUS — Continued.**

ogous civil actions, as is done in equity cases. An applicant for this writ should exercise due diligence. After the delay shown in this case the court below properly refused the application. *Ib.*

**MALICIOUS PROSECUTION.**

See **PLEADING**, 109

**MARRIAGE.**

*Prohibited — incestuous.* See **CRIMINAL LAW**, 50.

**MARRIED WOMAN.**

*Judgment on her promissory note erroneous, not void — defense of coverture.*

W. and his wife R. made a promissory note to B., and executed a mortgage of W.'s real property to secure its payment. R. did not receive any part of the consideration of the note. B. commenced an action on the note and mortgage, and the records of the court show that W. and R. appeared by an attorney, and filed a demurrer, which was overruled. No other defense was made, and a personal judgment was rendered against W. and R., and a deficiency judgment was entered against W. and R. upon the filing of the return of the sheriff, showing that a part of the first judgment remained unpaid after the sale of the mortgaged property. *Held*, that the judgments against R. were erroneous, but not void. *Held*, also, that the coverture of R. would have been a good defense in the action brought by B., but that her failure to plead the same does not affect the judgments against her, which are valid until they are reversed or annulled. *Vantilburg v. Black*, 459.

**MAXIM.**

*End of litigation.* The maxim that there should be an end of litigation applies in this case, where the applicant has had one appeal and an opportunity to show cause for rejecting or reducing receiver's charges and has failed to do so. *Ervin v. Collier*, 189.

**MINERAL LAND ACT.**

1. *How title acquired and preserved.* Under the act of congress of May 10, 1872, representation by annual performance of labor is constituted one of the muniments of title. No forfeiture can take place till after the full completion of the year, during which, by law, representation may be made. *Belk v. Meagher*, 65.
2. *Nature of title.* The right acquired by a locator of mineral ground on the public domain, acting in accordance with the provisions of law and local laws, rules and regulations, is a legal and exclusive right of possession, and so long as this right is kept alive by representation, no one else has the right to enter upon and re-locate the same. Such entry and re-location would be void and constitute no foundation to a valid claim or give any right of possession. *Ib.*
3. *Forfeiture.* When the original locator and his grantees have failed to represent a claim by doing the work required during any one full year, he who first locates the same, after the expiration of the year, acquires the best title thereto. *Ib.*

**MORTGAGE.**

1. *Interpretation — description of property.* The mortgage, which was a part of the complaint, embraced the "property owned by the Montana Flume and Mining Company; said property is located at and near the mouth of

**MORTGAGE — Continued.**

Alder gulch in section ten (10), township six (6), south of range four (4), west." At the trial it was proved that the property of said company was located in sections ten, eleven, thirteen and fourteen of said township, and the judgment authorized a sale of the same. *Held*, that the only property that could be sold under the mortgage was included in said section ten. *Largey v. Sedman*, 472.

2. *Interpretation by the parties.* The condition of the foregoing mortgage provided that, upon the payment by A. and B. of \$16,000 and interest at certain times, according to the tenor of a certain promissory note, and upon the payment by A. and B., upon said \$16,000, of the sum of \$4,000 at certain times, said mortgage and note should be void. The complaint and answer of C. treated the mortgage as security for the payment of the note for \$16,000. A. and B. did not appear in the action. The complaint alleged that A. and B. had paid on said note over \$12,000, and C. averred in his answer that A. and B. had paid thereon over \$23,000. C. contended that the note for \$16,000 was a penalty to secure the payment of \$4,000. *Held*, that the parties had interpreted the contract by their acts, that the note and mortgage were security for the payment of \$16,000, and that this interpretation was binding upon C. *Ib.*

See REVENUE LAW, 173.

**NEGOTIABLE INSTRUMENT.**

1. *Declarations of indorsers not receivable against subsequent holder of note.* The decision of the supreme court of the United States in the case of *Dodge v. Freedman's Saving and Trust Co.*, 3 Otto, 379, must control the courts of this Territory, which hold that the declarations or admissions of the indorser or assignor of a note as to the payment thereof, though such note were indorsed or assigned after maturity, cannot be introduced in evidence against a subsequent owner and holder thereof. *Shober v. Jack, adm'r*, 351.
2. *Surety on promissory note — release by extending time of payment — reduction of interest.* A. and B. made a promissory note September 1, 1873, and promised to pay C. a certain sum nine months after date, with interest at the rate of two per centum per month. A. paid the interest until November 1, 1874, when he signed the following memorandum on the note: "In consideration of further time being granted, I agree to pay one and one-half per cent interest per month on the within note until paid." A. was adjudged a bankrupt in 1875. Upon the trial B. offered to prove that he was a surety upon the note, and that A. and C. entered into an agreement, without his knowledge, to extend the time for the payment of the note until the spring of 1875, and reduced the rate of interest to one and one-half per cent per month. The court excluded the testimony, and entered judgment against B. *Held*, that there was no consideration for the extension of the time of the payment of the note by C., and that B.'s evidence did not establish a defense to the action. *Hale v. Forbis*, 395.

**NEW TRIAL.**

*Motion for.* See CRIMINAL LAW, 50.

**NOTE.**

See INTEREST, 153.

**OFFICER.**

*De facto.* See STATUTORY CONSTRUCTION, 426.

PARTIES.

*In interest.* In action upon a county treasurer's bond, the county being the real and only party in interest, and being created by law a body politic and corporate, through its board of commissioners, its legally constituted agents, is the proper party to institute action. *Commissioners of Jefferson County v. Lineberger*, 231.

See ACTION, 197 ; MANDAMUS, 364.

PARTNERSHIP.

*Oral.* See STATUTE OF FRAUDS, 15.

PATENT.

See FRAUD, 232.

PAYMENT.

1. *Of promissory note by order.* Upon the trial, B. testified that when the note was made and delivered to A., he gave him also an order upon C. for the payment of the note ; that a suit was then pending between B. and C. ; that B. afterward had a settlement with C., who reserved the amount of the note ; and that B. did not know what became of the order or the amount so reserved. A. testified that he received the order from B. ; and that C. refused to accept it and never paid it. *Held*, that the acceptance of the order by A. did not extinguish the note, unless there was an express agreement between A. and B. that it should be received as payment. *Held, also*, that it was the province of the jury to determine whether the order was taken by A. in absolute payment of the note, or as collateral security. *Knox v. Gerhauser*, 267.
2. *Return of order before judgment.* A. did not account for the foregoing order, or offer to return it to B., or deliver it into court, before the entry of the judgment against B. upon said note. *Held*, that the judgment was properly entered without requiring the surrender of the order *Ib.*

PHYSICIAN.

See CRIMINAL LAW, 50.

PLACER MINES.

See ADVERSE POSSESSION, 369.

PLEADING.

1. *Contract — tort.* There is no longer any distinction in the essentials of pleading under the modern reformed system, between actions *ex contractu* and *ex delicto*. *Higley v. Gilmer*, 90; *Mayne v. Creighton*, 108.
2. *Allegations of complaint — defense.* In an action for damages for injury of person, the plaintiff need not allege or prove that the same occurred without his fault or contributing neglect. Proof of such fault or neglect is proper matter of defense. *Ib.*
3. *Cross complaint.* A cross complaint should be set up separate from those portions of an answer intended for defenses. It should be complete in itself. *Meyendorf v. Frohner*, 282.
4. *Defense — new matter — general denial.* Under a general denial a defendant may give in evidence title in himself, and such allegations in the answer do not constitute new matter or present a new issue. A demurrer to such an answer admits only so much as goes to make a proper defense, all else may be rejected as surplusage. *Ib.*

## PLEADING — Continued.

5. *Effect of answer.* An answer is a waiver of a motion to strike out complaint or amendment thereto for want of proper verification, and also of any advantage that might have been taken by demurrer. *Collier v. Ervin*, 142.
6. *Counter-claim.* A counter-claim founded upon a tort cannot be set off against one founded on contract, unless it arose out of the transaction set up in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. An individual claim cannot be set up as a counter-claim to a joint indebtedness without alleging that the plaintiff is insolvent. *Ib.*
7. *Construction.* The words of the statute, "subject of action," should be construed to refer to the origin and ground of plaintiff's right to recover or obtain the relief sought, rather than as relating to the thing itself about which the controversy has arisen. *Ib.*
8. *Equitable estoppel in replication—waiver.* The answer of B. set forth an agreement, and the replication of A. alleged that B. was estopped from pleading the same, because he was present when A. purchased of said grantors the ditch, water-right and mines, and did not notify A. of the existence of the agreement. B. did not demur to the replication, and upon the trial all the facts relating to the agreement were offered in evidence by both parties. *Held*, that the replication does not allege the facts constituting an equitable estoppel, because it does not appear that A. was influenced in buying said ditch and water-right by the conduct of B., and that A. then had no convenient means of acquiring knowledge of the true state of the title thereto. *Held, also*, that B. waived his objections to this defective allegation of the replication by taking no exception to the same and allowing the introduction of evidence thereon as fully as if the facts had been properly pleaded. *Fabian v. Collins*, 215.
9. *Facts affecting jurisdiction of married women.* R. alleged in her complaint in this action that no summons was served upon her in the suit commenced by B., that she did not authorize any attorney to appear for her, and that she did not file a demurrer therein. B. in his answer denied these allegations, and averred that a summons was served upon R., that she appeared in court and filed a demurrer, and that she had actual knowledge of the judgments at the time the same were entered. The court struck from the complaint and answer these allegations and averments, and rendered judgment on the amended pleadings for R. *Held*, that the court erred in making these amendments to the pleadings, and that these issues were material, and should have been determined before the entry of a judgment in the action. *Vantilburg v. Black*, 459.
10. *Fact and conclusion.* An averment in a complaint in an action to recover on a promissory note, that the amount thereof is "due and payable," states only a conclusion of law, and does not as a fact allege a breach of contract. Such pleading is bad on demurrer. But when there has been an answer over a trial upon the merits, in which it was found as fact that the note was not only due but wholly unpaid, and a judgment or decree, the same will not be disturbed for this mere technical defect. *Hershfield v. Aiken*, 442.
11. *Defective pleading cured by answer, trial, and verdict.* A defective complaint may be cured when the material fact omitted therefrom has been supplied by the answer. Answering over and going to trial on the merits ought to be held a waiver of a technical defect in a complaint. After verdict it will be presumed that the proof on the trial supplied the defect in the pleading. *Ib.*
12. *Amendment.* Even after judgment leave to amend so that the issue in the pleadings should correspond with the proof should be allowed in furtherance of justice, on terms. *Ib.*
13. *Judgment.* In pleading the judgment of a court of competent jurisdiction, it is sufficient to aver that the same was duly given or made, without setting forth the facts conferring jurisdiction. *Territory v. Cox*, 197.

## PLEADING — Continued.

14. *Malicious prosecution — answer.* It is incumbent on the plaintiff to allege in his complaint and to prove on trial, "malice and want of reasonable or probable cause," for prosecution. Under a general denial, the defendant may show that he acted upon the advice of counsel learned in the law and upon a full presentation of the facts, and this would be an effectual defense. It is not error for the court below to strike out from the answer such matter when specially and insufficiently pleaded. *Smith v. Davis*, 109.
15. *Damages.* In action for malicious prosecution it is competent to allege and prove special as well as ordinary damages. *Ib.*
16. *Pleadings govern evidence.* B.'s answer alleged that B. was a resident of California when the note was made. B. testified that he resided in Nevada when the note was made. *Held*, that this court must be controlled by the facts appearing in the answer. *Knox v. Gerhauser*, 267.
17. *Replication — general or specific denial.* The Civil Practice Act of Montana, 1874, prescribes what an answer shall contain, but is silent as to replication. As to new matter contained in the answer the replication should follow the requisites of an answer, whether the denial should be general or specific. *Hammer v. Edwards*, 187.
18. *Use of initial letter for Christian name.* If the instrument issued on is defective in using only the initial letter, instead of full Christian name, the same may be cured by proper averment in pleading and proof on trial. *Curtis v. Valiton*, 153.
19. *Waiver of objection to joinder of defendants.* The complaint alleged that the defendants, A., B. and C., were copartners, and that the defendants were indebted to the plaintiff upon an account. The answer denied the allegations of the complaint, but did not plead that too many persons had been joined as defendants, and this fact does not appear in the complaint. The evidence proved that C. alone was indebted to the plaintiff, and judgment was entered against him. *Held*, that C. waived his objection to the number of persons who had been joined as defendants, by failing to plead the matter in his answer. *Held, also*, that the allegation of the copartnership could be treated as immaterial, and that the judgment was proper. *Conklin v. Fox*, 208.

## PRACTICE.

1. *Appeal dismissed when no proper judgment or order entered.* Upon the trial the court below excluded the evidence of the plaintiff, refused to hear any testimony for the defendant, discharged the jury, dismissed the action and declined to enter any judgment for or against either party. *Held*, that there was no judgment or order from which the statutes of the Territory allow an appeal to be taken, and this court of its own motion dismissed this appeal. *Beattie v. Hoyt*, 140.
2. ———. *From part of judgment.* This action was brought to foreclose a mortgage executed by A. and B., and the judgment authorized the sale of the property of A. and B., and was adverse to C., who claimed an interest in the property. A. and B. did not appeal, and C. appealed from the judgment affecting his rights. *Held*, that C.'s appeal had been properly taken. *Largey v. Sedman*, 472.
3. *Assignment of errors.* An assignment of error will be disregarded that does not specify particularly and clearly wherein the evidence fails to support the verdict. *Stafford v. Hornbuckle*, 485.
4. ———. *Instructions — receiving verdict.* If errors in instructions given by the court below are relied on, the same must be specially noticed in exceptions taken or they will be disregarded. Objections to the form of receiving the verdict of a jury can only be considered by the appellate court when saved by proper bill of exceptions. *Fredericks v. Davis*, 251.
5. *Correction of statement on appeal.* After a statement on appeal has been settled by the judge who tried the cause, this court will not correct the

## PRACTICE — Continued.

- same by receiving the affidavits of parties claiming that the testimony of witnesses had not been reported correctly. *Largey v. Sedman*, 357.
6. *Exceptions not in record.* The evidence and many errors relied on by B. did not form a part of any bill of exceptions that had been reduced to form and signed by the judge who tried the cause. *Held*, that this court cannot consider the same on this appeal. *Ib.*
  7. ———. The affidavits of B. showed that counsel for A. in arguments to the jury referred to matters which were not in the evidence. No exception was taken or saved to these statements which were embodied in the affidavits after the entry of the judgment. This conduct was one of the grounds in B.'s motion for a new trial. *Held*, that this court cannot consider this ground of the motion, because no exception was taken to the statements when they were made. *Higley v. Gilmer*, 433.
  8. *Findings and issue.* Where the property of a wife is attached as that of the husband, on the allegation that the wife's ownership is fraudulent as against creditors, and upon trial before the court the finding is that the property belongs to the wife as a sole trader, *held*, that such finding fully covers the issue of fraud. *Fredericks v. Clark*, 258.
  9. *Implied findings.* The judgment recites that the equities of the case are in favor of A. and there is no finding upon the issue of the estoppel. *Held*, that this action is governed by the Civil Practice Act, approved January 12, 1872, and that this court must presume that the court below found on this issue for A. *Fabian v. Collins*, 215.
  10. *Judgment affirmed if findings are not inconsistent with it.* This action was tried by the court without a jury, and an appeal was taken from the judgment. There was no motion for a new trial, and the appellant did not request any findings upon the issues, nor move to correct the findings by the court. A judgment was entered in conformity with the findings. *Held*, that this court cannot examine any question of fact in the case, and that the judgment must be affirmed, because the findings are not inconsistent with the judgment. *Chumasero v. Vial*, 376.
  11. ———. *For counter-claim.* The answer of B. sets up a counter-claim for \$1,130, which was admitted by A. in his replication. The jury returned a verdict for \$2,109. *Held*, that a judgment should have been entered for A. for the difference between these sums, or B. should have had a judgment for the amount of his counter-claim. *Story v. Maclay*, 480.
  12. *Question raised by general exception.* A general exception to leave granted to amend a pleading only raises the general question as to the authority of the court to allow amendments of pleadings during the progress of a trial. This power cannot be disputed. *Randall v. Greenwood*, 506.
  13. *Immaterial errors.* Immaterial errors of ruling will not reverse a judgment. Though the record shows that the court below erred in allowing leading questions to be put to witnesses, or in disallowing questions proper under some circumstances, yet judgment will not be reversed therefore, if it is apparent from the whole record that appellants have not been injured thereby. *Ib.*
  14. *How exceptions must be saved.* The appellate court will not regard exceptions unless they are taken in substantial compliance with the statute. Such exceptions must be reduced to writing, be signed by the judge and filed with the clerk before the submission of the cause to the jury. *Ib.*
  15. *Relief from erroneous judgment — motion after adjournment of term.* R. filed a motion to vacate the judgment against her at the first term of the district court that was held after they had been entered, and the motion was overruled. R. did not appeal from any of these proceedings, or set forth in her complaint any excuse for her neglect so to do, and commenced this action to annul the judgments about sixteen months after the entry of the deficiency judgment. *Held*, that the court did not have jurisdiction to entertain this motion after the adjournment of the term at which the personal judgment was entered. *Held*, also, that R., having failed to use

**PRACTICE — Continued.**

- proper diligence in seeking legal remedies, and exercising her statutory right of appeal within a year after the commission of the acts complained of, cannot maintain this action for equitable relief. *Vantilburg v. Black*, 459.
16. *Service of amended complaint on attorney of record.* This court reversed the first judgment in the action and remanded the cause for a new trial. A. filed March 15, 1876, an amended and supplemental complaint by leave of the court, and B. was ordered to plead thereto on or before March 18, 1876. No pleading was filed by B. until December, 1876, when he moved to strike the complaint from the files, because no copy had been served on him or his attorney. C. appeared in the original action and on the hearing of the first appeal as B.'s attorney and did not withdraw his appearance. By A.'s direction, the clerk of the court tendered a copy of said complaint to C., who refused to receive it on the ground that he had ceased to be B.'s attorney. The court allowed B. to answer to the merits upon the payment of certain costs. *Held*, that A. was authorized to serve said copy on C., as B.'s attorney, and that the refusal of C. to accept it was a waiver of B.'s right to demand it. *Roush v. Fort*, 175.
  17. *Taxation of costs.* *Held, also*, that the court, in the absence of any excuse for B.'s delay, exercised its discretion properly in taxing the costs. *Ib.*
  18. *Filing of amended complaint after decision of this court.* By the decision of this court on the first appeal, certain issues and the rights of two plaintiffs were finally determined. These issues and parties were omitted in the amended complaint, and the character of the action was thereby changed. *Held*, that it was necessary and proper for A. to file a supplemental complaint in conformity with the decision of this court. *Ib.*
  19. *Hearing motion against rule of court — pleading judgment satisfied of record.* B. alleged in his answer that A. was indebted to him on account of a judgment for the foreclosure of a mortgage; that the mortgaged property had been sold by the sheriff, and the judgment was thereby satisfied; that the sale had been set aside by this court; that the amount secured by the mortgage was unpaid, and that A. was insolvent. B. prayed that this judgment might be set off against the claim of A. for the rents and profits of said property. On A.'s motion these allegations were struck from the answer. The court heard the motion on the day it was filed and the rules prohibited this action within twenty-four hours after such filing. *Held*, that B. should have resorted to the remedy, prescribed in the Civil Practice Act, to revive said judgment, and that the judgment, while it remained so satisfied, was not a subject of set-off or counter-claim in this action. *Held, also*, that the determination of the motion within twenty-four hours after the filing thereof was an irregularity by which the substantial rights of B. were not prejudiced. *Ib.*
  20. *Objection to sufficiency of complaint.* If the complaint does not support the judgment, the objection can be made for the first time in the supreme court. *Gillette v. Hibbard*, 412.
  21. *Summons.* In an action on his official bond against a defaulting treasurer and his sureties to recover the penalty therein for breach of the conditions thereof, it is a sufficient compliance with the statute to state in the summons that the action is brought to recover the penalty named in the bond, with interest and costs of suit. *Comm'rs of Jefferson County v. Lineberger*, 231.
  22. *Waiver of defective notice in summons.* A. commenced this action against B., to recover damages for slander, and the summons notified B. that, if he failed to appear and answer the complaint, judgment would be taken against him for the sum claimed in the complaint and costs. B. filed a motion to quash the summons on the ground that this notice was in conflict with the Civil Practice Act. The court overruled this motion and B. filed a demurrer to the complaint, which was overruled, and then filed his answer. The cause was continued for the term, at the request of B.,

## PRACTICE — Continued.

who filed an amended answer under a stipulation of the parties. Afterward, B. filed a second amended answer and proceeded to a trial upon the merits, and judgment was entered for A. B. excepted to the action of the court in refusing to quash the summons, and assigned the same as one of the grounds of his motion for a new trial. *Held*, that the notice in the summons was illegal, and that B. waived the defects in the summons by his acts after his motion to quash the same had been overruled. *Dyas v. Keaton*, 495.

See FORCIBLE ENTRY AND DETAINER, 387.

## PRINCIPAL AND AGENT.

See AGENCY.

## RATIFICATION.

See AGENCY, 118.

## RECOGNIZANCE.

See CRIMINAL LAW, 168.

## RENTS.

*Liability of occupant of real property for.* B. deprived A. of the possession of real property by his fraudulent conduct from May 10, 1872, until February 5, 1876. *Held*, that B. was liable to A. as an occupant for the value of the rents and profits. *Roush v. Fort*, 175.

*When trustee liable for.* See TRUSTEE, 175.

## REPLICATION.

See PLEADING, 187.

## REVENUE ACT.

See STATUTORY CONSTRUCTION, 35.

## REVENUE LAW.

*Construction — mortgage — record.* A mortgage on real estate is only personal property, and under the Revenue Law of Montana (Codified Laws of 1871–2) can only be assessed in the county where found. The record of such mortgage in the recorder's office of a county, being only a copy of the original, is not taxable personal property. *Gallatin County v. Beattie*, 173.

## REVERSAL.

*Of judgment — effect of — district court to examine opinion.* When a judgment is reversed for an error occurring subsequent to the trial, the effect is to put the parties back to the stage of the case where the error occurred, but does not warrant a trial *de novo*. In such case the motions to amend, and try the case *de novo*, were properly overruled. *Woolman v. Garringer*, 2 Mon. 405, cited and approved. The district court may examine the opinion of the supreme court to ascertain how to give proper effect to the judgment if reversed. *Ervin v. Collier*, 189.

## SODOMY.

See CRIMINAL LAW, 112.

## STATUTE OF FRAUDS.

1. *Oral—copartnership for locating quartz lode.* A., B. and C. entered into a verbal contract of copartnership to prospect for, locate, record, pre-empt, develop and mine quartz lodes in this Territory. Each party was to have the same interest in the property. The Silver Girdle lode was discovered by the parties, but it was recorded by B. and C. in their names April 28, 1873. Afterward, in July, 1875, all the parties worked upon and developed the property. After the lode had been recorded D. located and pre-empted a part of the Silver Girdle lode under the name of the Burlington lode, but the conflict of title was settled by a conveyance by D. to B. and C. of 1,350 feet of the Burlington lode, which had been included in the Silver Girdle lode. B. and C. refused to give A. any interest in the lode, or account for the proceeds thereof. *Held*, that the contract between A., B. and C. was not within the Statute of Frauds, and could be enforced. *Held, also*, that the conveyance from D. to B. and C. did not impair the rights of A. *Hirbour v. Reeding*, 15.
2. *Letter expressing consideration of agreement.* O., the clerk of the district court, notified C., an attorney for P., that he would not make out a transcript on appeal for P. unless C. would guarantee the payment of his fees. C. then wrote a letter to O. and said: "You will please make out the record in the P. \* \* \* case and we will guarantee the payment of your fees by him, P. \* \* \*." The letter directed O. to complete the record by a specified time, so that it might be used for certain purposes by P., and also call upon B. for information and advice about P.'s case. O. then made out the record and brought this action against C. upon the failure of P. to pay his fees. *Held*, that the consideration of the agreement in writing, within the meaning of the statute concerning "conveyances and contracts," was expressed in C.'s letter to O. *O'Bannon v. Chumasero*, 419.

## STATUTE OF LIMITATIONS.

1. *Possession—fence.* In 1872 A. bought of B. a dwelling-house and other buildings which were upon a mill site of C., a foreign corporation. C. received a patent thereto from the United States in 1869. Afterward A. inclosed these improvements with a good and substantial fence in 1873, and resided on said tract without interruption until April, 1876, when the agent of C. asserted its title to the premises and demanded rent therefor. A. testified on the trial that she always claimed to be the owner of the property, and the agent testified that he did not know that she so claimed it until April, 1876, but knew that she built the fence and occupied the premises from 1872 until October 1, 1876, when C. commenced this action. *Held, also*, that this action was commenced more than three years after the right to bring the same accrued, and was barred by the Statute of Limitations of this territory. *National Mining Co. v. Powers*, 344.
2. *Promissory note—residence of maker.* A. commenced this action against B. April 1, 1875, upon a promissory note made in California October 1, 1869, in which B. promised to pay one day after date a certain sum in gold coin, or its equivalent, with interest. The complaint alleged that A. and B. were residents of California when the note was made, that B. resided in Nevada from May 1, 1871, until June 1, 1872, when he removed to Montana; and that he has resided in this Territory since that time. B. moved to strike from the complaint these allegations and the motion was overruled. *Held*, that these allegations were material, and that the complaint without them would have stated a cause of action that was barred by the Statute of Limitations. *Knox v. Gerhauser*, 267.
3. *Same—"lapse of time" in California and Montana laws.* Under the laws of this Territory, an action which cannot be maintained in California upon said promissory note, by reason of the lapse of time, cannot be maintained in this Territory. The statutes of California provide that an action upon

## STATUTE OF LIMITATIONS — Continued.

a promissory note must be commenced within four years, and that the time during which a person is absent from the State after a cause of action has accrued against him shall not be a part of the time limited for the commencement of the action. *Held*, that this action was not barred by the Statutes of Limitations of California or this Territory. *Ib*.

See ACTION, 193, 197; CONSTITUTIONAL LAW, 412; MANDAMUS, 364; TOWN SITE, 82.

## STATUTORY CONSTRUCTION.

1. *Act governing appeals in action brought in 1876 — filing papers "by" a certain date.* A. commenced this civil action April 24, 1876, and obtained a judgment against B. in December, 1878, when a trial was had. The court below extended the time for B. to file his notice of motion for a new trial from December 23, 1878, until January 9, 1879, and also ordered that the bill of exceptions and statement be filed "by" January 20, 1879. B.'s motion for a new trial was filed January 8, 1879, and some affidavits in support of the same were filed January 20, 1879. A. objected to the use of the affidavits on the hearing of the motion, but the objection was overruled and the motion was refused April 4, 1879. *Held*, that the Code of Civil Procedure, approved February 16, 1877, does not govern this appeal, and that the same must be determined under the amendments to the Civil Practice Act, approved February 13, 1874. *Held*, that the affidavits could be filed January 20, 1879. *Higley v. Gilmer*, 433.
2. *Extradition.* Section 448 of our Criminal Practice Act makes it the duty of the governor, not as executive of the Territory, to audit the expenses of the messenger duly appointed to return a fugitive from justice. These expenses would properly include a reasonable compensation for time as well as actual and necessary outlays of money in the service, and should not necessarily depend on the return of the fugitive. What such reasonable compensation would be is left by the statute to the discretion of the governor, but an application to compel the governor to audit such a claim, if made in due time, should be entertained. *Territory ex rel. Tanner v. Potts*, 364.
3. *License of "insurance company agent."* An act of the legislative assembly of the Territory, approved May 8, 1873, provides that "there shall be levied and collected by the tax collector a license tax \* \* \* for each and every insurance company agent or agencies, transacting business in this Territory, the sum of one hundred and fifty dollars per year." *Held*, that every person, who is the agent of an insurance company, must pay this license, and that an insurance company is not liable therefor. *Held, also*, that the number of insurance companies having the same agent does not affect his license, which cannot exceed "one hundred and fifty dollars per year." *Taylor v. Ashby*, 248.
4. *Butte City charter — police magistrate and justice of the peace.* The provision in the Butte City charter authorizing the mayor to nominate, and with the advice and consent of the city council, to appoint a police magistrate, and conferring upon such officer so appointed the jurisdiction of a justice of the peace is not in conflict with the Organic Act of the Territory, nor with section 1856 of the Revised Statutes of the United States, which provides that justices of the peace in the several Territories shall be elected by the people in such manner as the respective legislatures may provide, but is a substantial compliance therewith. *Parks*, petitioner for writ of *habeas corpus*, 426.
5. *De facto officer — habeas corpus.* A *de facto* officer is one who comes into a legal and constitutional office by color of legal appointment or election. Even though the law under which such officer holds be unconstitutional or repugnant to the laws of congress, he would still be a *de facto* officer, and

**STATUTORY CONSTRUCTION** — Continued.

his title of office can only be inquired into by direct proceeding instituted for that purpose, and not by a collateral proceeding, as in *habeas corpus*. *Ib.*

6. *Revenue Act* — *silver bullion*. In construing the several sections of the Revenue Act (Codified Statutes, 1872), the aim must be to ascertain the intention of the legislature as far as possible by the act itself, as a whole, and with all its parts. Section 4 of this act cannot be construed alone to the disregard of other sections containing general provisions equally explicit. Nor can the enumeration therein of certain kinds of property liable to taxation be properly construed as exempting other species of property not enumerated. Taxation is the rule, and exemption the exception. *Hope Mining Co. v. Kennon*, 35.
7. The exemption of unpatented mines does not extend to the product of such mines, nor is it liable to the charge of double taxation, because the stock of an incorporated company is taxable, and also the products of a mine worked by such company. *Ib.*
8. Silver bullion is property within the meaning of the law, and not being contained within any express exemption, must be regarded as taxable under the law. *Ib.*

See CRIMINAL LAW, 50; PLEADING, 142; REVENUE LAW, 173.

**STAY.**

*Of execution.* See APPEAL, 211.

**SUMMONS.**

*Defective, how waived.* See PRACTICE, 495; JURISDICTION, 45.

**SURETY.**

1. *Liability of, on bond of county treasurer.* A. was the county treasurer of Missoula county, and executed a bond December 9, 1873, which was duly filed and approved. Some of the sureties wishing to be released therefrom, another bond was executed, filed and approved July 12, 1875. A settlement took place between the county commissioners and A., September 7, 1875, when the second bond was accepted in lieu of the first. A.'s official term expired March 5, 1876, and there was a deficiency in his accounts as treasurer. This action was commenced against the sureties upon the first bond to recover the amount of the deficiency, and judgment was entered in their favor. *Held*, that the sureties on the first bond are not liable for any deficiency occurring in A.'s accounts after September 7, 1875, and that the sureties on the second bond are liable therefor. *Missoula County v. Edwards*, 60.

See NEGOTIABLE INSTRUMENT, 395.

**SURPLUSAGE.**

See CRIMINAL LAW, 50.

**TIME.**

*Computation of.* In cases arising under statute or notice given in accordance with statute, where the last day on which a required act can be performed falls on Sunday, the act may well be done on the following day. *Schnepel v. Mellen*, 118.

## TOWN-SITE ACT.

1. *Dedication of street—Statute of Limitations—remedy of occupant.* A. occupied and inclosed in 1866, a tract of land in Helena, and possessed it until the commencement of this action in November, 1876. The plat of the town-site of Helena, designating a street and alley on said land, was filed and approved in 1869, but the fences and buildings were never removed. In 1869, after the publication of the notice in the newspapers as required by law, A. filed applications with the trustee of the town-site and received deeds to the part of the tract which was not included within a street or alley. A. never filed applications for any part of the street or alley, although he had valuable improvements thereon, and accepted deeds which described lots bounding on said street or alley. A. was indicted for obstructing the street and alley. The act of the legislative assembly of the Territory, relating to town-sites, prescribes the time within which the claimants to lots must assert their rights thereto, and gives them a right of appeal to the district court. The statute provides further that the streets and alleys designated in the plat of the town, after the filing of the plat in the proper office, "shall remain dedicated to public use forever." *Held*, that A. was confined to his statutory remedy to obtain said land, and could not assert any title to the street or alley after the plat had been filed and accepted, and the time limited by law had expired. *Held*, also, that the Statute of Limitations of the Territory does not affect the right of the public to the use of the street and alley, and that A. was indicted properly for obstructing the same by maintaining his fences and buildings which had been erected in 1866. *Territory v. Deegan*, 82.
2. *Filing statement of claim — forfeiture.* The Town-Site Act of Montana provides for no forfeiture for failure to file statement of claim within the time limited in notice of entry by probate judge or corporate authorities; such statement may well be filed subsequently. The case is analogous to those arising under the U. S. Pre-emption Laws. *Schnepel v. Mellen*, 118.
3. *Possession and occupancy.* Actual possession and occupancy required as preliminary to making statement of claim and proof thereunder must be open, notorious, apparent, unequivocal, uninterrupted and exclusive; carrying with it dominion of claimant as against all other persons with evidence of ownership visible to all the world, and not be simply a temporary and partial occupancy of a bare trespasser. *Ib*.
4. *Trustees.* The probate judge or corporate authorities under the Town-Site Act of Montana are only the trustees of such as by occupancy and possession as above defined are entitled to make a valid statement of claim. *Ib*.

## TREASURER.

*County.* See SURETY, 60; BOND, 231.

## TRIAL.

1. *Instructions.* Should be based upon the facts appearing in evidence. *Territory v. McAndrew*, 158.
2. ———. It is not error to refuse an instruction already given in substance. *Ib*.
3. ———. *Sufficiency.* A judgment will not be reversed for insufficiency or defect of a single instruction, if all the instructions taken together state the law correctly. *Higley v. Gilmer*, 90; *Mayne v. Creighton*, 108.
4. *Jury in action for diverting water.* Upon the trial of an action for diversion of water, and injunction, B. demanded a trial of all the issues by a jury and a general verdict, but the court submitted to the jury a number of special findings and based them upon its judgment. *Held*, that this

**TRIAL—Continued.**

was a case in equity, and that B. was not entitled to a trial by jury. *Fabian v. Collins*, 215.

5. *Verdict—separation of jury.* The separation of a jury in a criminal case, after having agreed upon a verdict, is not such misconduct as will set aside a verdict. To have this effect the court must be satisfied that the misconduct was such that it had or might have had an unfavorable effect upon the verdict. *Territory v. Hexter*, 206.
6. *Right to speedy.* See CONSTITUTIONAL LAW, 512.

**TRUSTEE.**

*Liability for rents and profits.* Under an agreement between the parties, B. had the possession of the property mortgaged to him by A., during the six months following November 10, 1871, and was required to pay the rents and profits upon certain accounts. Under the order of the court, the referee found that B. should pay A. \$450, the value of the rents and profits during this time, which B. might or should have received as the applicant. The testimony did not show the amount that was paid to B. *Held*, that B.'s liability to A. was that of a trustee, and that he should have exercised an ordinary degree of care and diligence in the management of the property. *Held, also*, that this court cannot determine from the evidence the sum that B. received as such trustee. *Roush v. Fort*, 175.

**UNDERTAKING.**

*On appeal.* See ACTION, 193.

**VARIANCE.**

See CRIMINAL LAW, 50.

**WAIVER.**

*Of defect in summons.* See PRACTICE, 495.

See JURISDICTION, 45; PLEADING, 208.

**WATER.**

1. *Diversion of—complaint in action for equitable relief.* The complaint alleged that A. and his grantors on and before April 19, 1876, were the owners of a ditch that conveyed the water of Silver creek in Ottawa gulch upon their placer mines in Jenny's basin; that they had a prior right to the use of the water through said ditch; that while A. was in the peaceful possession of the water, B. wrongfully diverted the same from the ditch; that B. had diverted the water since April 19, 1876, and threatened to continue such diversion; that A. would thereby be wholly deprived of the use of the water, and great and irreparable injury would result to A., unless B. was enjoined from diverting the same. *Held*, that the complaint states a cause of action, and that A. is entitled to equitable relief against B. *Fabian v. Collins*, 215.
2. *Verbal license—appropriation of water by possession of ditch.* The grantors of A. entered into a verbal agreement with B., under which they had the privilege of using said water upon their mines in said basin, but were required, upon the demand of B., to permit the water to flow down said gulch to the mining ground of B. Afterward, in 1867, they dug said ditch and used the water until 1872, when they sold and delivered to A. their mines, ditch and water-right. A. used the water in said ditch until April, 1876, when B. demanded the same, and diverted it upon the refusal of A. to deliver the same, and A. then commenced this action. The agreement was never reduced to writing and A. had no notice thereof. *Held*, that B. had a prior right to the use of the water, and that the appropriation by A.

## WATER — Continued.

must date from 1872, when he took possession of said ditch. *Held, also*, that the agreement was a personal license from B. to the grantors of A., that B. could revoke the same at any time, and that said grantors could not sell and convey any right in the water to A. Ib.

3. *Estoppel of witness and draftsman of deed conveying water.* A. purchased said mines in said basin in 1872. The deed was prepared by B., who also witnessed its execution, and described the property "with the water-right and ditches and other appurtenances thereunto belonging to the aforesaid mining ground." B. knew that the mines could not be worked successfully without the use of this water, and the parties talked with B. about the contents of the deed. B. knew further that the ditch and water-right were embraced in the sale and description in the deed, and did not inform A. of the claim of any person to the water. *Held*, that B. is estopped from asserting a right to the water adverse to A., and that B. should have notified A. of his claim to the water before the execution of the deed. Ib.

*Action for diversion.* See ACTION, 193.

## WITNESS.

*Proof of handwriting.* In this Territory the rule as laid down by the U. S. supreme court in *Strother v. Lucas*, 6 Pet. 767, must prevail, which establishes that a witness is not competent to testify as to the genuineness of a signature, who has no other knowledge thereof except that derived by a comparison with others acknowledged to be genuine. Even in States where such testimony is admissible by statute, the genuineness of the signature used as a standard of comparison must be established by a higher grade of evidence than the opinion of a witness. *Davis v. Fredricks*, 262.

See CRIMINAL LAW, 50 ; EVIDENCE, 351.







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